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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 256.

CLIFTON H. MOORE ET AL., PLAINTIFFS IN ERROR,

vs.

RUFUS W. ROBBINS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED OCTOBER 18, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 256.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print
Assignment of errors	*a*	1
Judgment of supreme court	2	2
Proceedings in circuit court, De Witt County	4	3
Order referring case to master	5	3
Order of court	10	5
Decree	11	6
Agreement	16	7
Assignment of errors	18	8
Order of court	20	8
Record in Robbins *vs.* Bunn *et al*	20	8
Opinion supreme court Illinois	139	40
Final judgment	140	40
Allowance of writ of error	142	41
Writ of error	143	42
Bond	146	43
Citation and service	148	43
Clerk's certificate	149	48

a *Writ of error from the supreme court of Illinois.*

Supreme Court of the United States, Washington City, D. C., October term, 1875.

CLIFTON H. MOORE ET AL.)
vs.)
RUFUS W. ROBBINS.)

And now comes the plaintiffs in error and assign the following errors upon this record:

1st. The court below erred to the injury of the plaintiff Davis in holding that the purchase of Mitchell (Davis*es* grantor) of the S. E. ¼ of the S. W. ¼, sec. 27, T. 19, R. 3 east, of 3rd P. M., at a public sale of lands at Danville, Ill's, on Nov. 15th, 1855, for coin, without notice of Bunn's pre-emption, was a fraud upon Robbins, the defendant in error.

2nd. The court below erred to the injury of plaintiff Davis in holding that Bunn's pre-emption claim upon the S. E. S. W. ¼, sec. 27, T. 19, R. 3 east, of the 3rd P. M., (Danville land-district, Illinois,) was a valid pre-emption, when it was proven that he made no improvements until about the end of the year, and never lived on the land but one week, & did not have any declaratory statement on file in the land-office at the time of sale to Mitchell.

b 3rd. The court below erred in holding that plaintiff in error, Moore's, purchase of the S. W. S. W. ¼ of sec. 27, T. 19, R. 3 east, of 3rd P. M., at a public sale of lands made by the land-officers at Danville, Illinois, on Nov. 15th, 1855, for coin, without notice of Bunn's pre-emption on the same land, was a fraud upon Robbins, the defendant in error.

4th. The court below erred to the injury of plaintiff, Moore, in holding that Bunn's pre-emption claim upon the S. W. S. W., sec. 27, T. 19, R. 3 E., of 3rd P. M., (Danville land-district, Illinois,) was a valid pre-emption, when it was proven that he made no improvements on said land until about the end of the year, and never lived on the land with his family but one week, & had no notice of his claim on file in the land-office at the time of sale to Moore.

5th. The court below erred to the injury of plaintiffs in error in holding that Moore's patent from the Gen. Government to the S. W. S. W., sec. 27, T. 19, R. 3 E. 3rd P. M., and Davis*es* title, acquired through Mitchell, to S. E. S. W. ¼, sec. 27, T. 19, R. 3, were obtained in fraud of Bunn's rights to the same land.

6th. The court below erred in holding that the appellants or either of them held their title to the land in controversy in trust for Robbins.

c 7th. The court below erred to the injury of plaintiffs in error in not ordering an account to be taken of the taxes paid by Moore, Mitchell, & Davis on the land and decre'ing the amount so paid to be a first lien on the land and to be paid out of the fund arising from the sale of the same on Robbins' foreclosure of the mortgage made by Burns on same land.

8th. The court below erred in holding that the mortgage made by Thomas J. Burns to his father, Lewis Burns, only two days after he had paid for his pre emption, & before he had obtained his patent, was a valid mortgage.

9th. The court below erred in holding that the decisions of the land-officers are binding upon Moore & Mitchell, who purchased the land at a public sale made by said officers and paid in coin for the same, without notice, actual or constructive, of Bunn's pre-emption claim on the same land.

For these errors the appellants ask that the decrees & orders heretofore made by the courts below may be reversed.

C. H. MOORE, *pro se.*

d STATE OF ILLINOIS,
Supreme Court, Central Grand Division, ss:

At a supreme court for the central grand division of the State of Illinois, begun and held at Springfield, to wit, on the 5th day of January, A. D. 1875, to wit, on the 3d day of February, A. D. 1875.

Present, Pinkney H. Walker, chief justice; Sidney Breese, justice; John M. Scott, justice; William R. McAllister, justice; Benjamin R. Sheldon, justice; John Scholfield, justice; Alfred M. Craig, justice.

Be it remembered that on the 6th day of January, A. D. 1875, it being the second day of said January term, there was filed a record in the clerk's office in the words and figures following, to wit:

Appeal from DeWitt.

DAVID DAVIS AND CLIFTON H. MOORE
vs.
RUFUS W. ROBBINS. } 206.

1 STATE OF ILLINOIS,
DeWitt County, ss:

Pleas before the Hon. Lyman Lacey, judge of the seventeenth judicial circuit of the State of Illinois, and sole presiding judge of the DeWitt County circuit court, at a term thereof begun and held at the court house in the town of Clinton, in said county of DeWitt and State of Illinois, on the sixteenth day of the month of March, in the year of our Lord one thousand eight hundred and seventy four, that being the third Monday of said month of March, there being—

Present, Hon. Lyman Lacey, judge aforesaid; Stephen K. Carter, esq., State's attorney; Thomas Gardner, jr., sheriff of said county; Wm. H. Harrison, clerk of said court.

Be it remembered that heretofore, to wit, on the 20th day of October, A. D. 1870, there was filed in the office of the clerk of said circuit
2 court a final order of reversal in the words and figures following, to wit:

STATE OF ILLINOIS,
Supreme Court, Central Grand Division, ss:

At a supreme court, begun and held at Springfield on Tuesday, the 4th day of January, in the year of our Lord one thousand eight hundred and seventy, to wit, on the 4th day of February, in the year of our Lord one thousand eight hundred and seventy.

Present, Sidney Breese, chief justice; Charles B. Lawrence, Pinkney H. Walker, justices.

Appeal from DeWitt.

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, & DAVID DAVIS.

On this day came again the said parties; and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and

3 being now sufficiently advised *and* concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error. Therefore it is considered by the court, that for that error, and others in the record and proceedings aforesaid, the decree of the circuit court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain. And it is further considered by the court that the said appellant recover of and from the said appellees costs by him in this behalf expended, and that he have execution therefor.

I, William A. Turney, clerk of the said supreme court, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above-entitled cause, of record my office.

4 In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court, at Springfield, this 19th day of October, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.]

WM A. TURNEY,
Clerk of the Supreme Court.

And afterwards, at a regular term of the circuit court, in and for the county of De Witt, State of Illinois, begun and held at Clinton, in said county, on Monday, the seventh day of November, A. D. 1870, that being the first Monday in said month.

Present, Hon. Thomas F. Tipton, judge 8th judicial dist.; Jonathan H. Rowell, State's attorney; Alonzo D. McHenry, sheriff; William L. Chambers, clerk.

Among other the following proceedings were had, to wit:

Fifteenth day, November term, 1870.

THURSDAY, *Nov. 24th*, 1870.

5 R. W. ROBBINS *vs.* THOMAS J. BUNN. } Foreclosure.

This day came the parties hereto, by their solicitors, and now this cause coming on to be heard and was argued by counsel, and the court, having heard the same, doth order that this cause be referred to Joseph J. Kelly, as special master in chancery, to state the amount due on the note and mortgage herein.

And afterwards, at a regular term of the said circuit court, begun and held at the court house in Clinton, in said county, on Monday, the first day of May, A. D. 1871, that being the first Monday of said month.

Present, Hon. Thomas F. Tipton, judge 8th judicial circuit; Thomas Gardner, jr., sheriff; William L. Chambers, clerk.

Among other the following proceedings were had, to wit:

Twelfth day, May term, 1871.

6 SATURDAY, *May 13th*, 1871.

R. W. ROBBINS *vs.* THOMAS J. BUNN ET AL. } Foreclosure.

This cause is ordered to be continued.

And afterwards, at a regular term of the said circuit court, in and for

said county, begun and held at the court-house in Clinton, in said county, on Monday, the sixth day of November, A. D. 1871, that being the first Monday of said month.

Present, Hon. Thomas F. Tipton, judge 8th judicial dist.; Jonathan H. Rowell, State's attorney; W'm L. Chambers, clerk.

Among other the following proceedings were had, to wit:

Fifth day, November term, 1871.

SATURDAY, *Nov.* 11, 1871.

R. W. ROBBINS *vs.* T. J. BUNN ET AL. } Foreclosure.

7 This cause is ordered to be continued.

And afterwards, at a regular term of said circuit court, in and for said county, begun and held at the court-house in Clinton, on Monday the 4th day of March, A. D. 1872, that being the first Monday of said month.

Present, Hon. M. C. Crawford, judge 30th judicial dist., presiding; Jonathan H. Rowell, State's attorney; Thomas Gardner, j'r, sheriff; W'm L. Chambers, clerk.

Among other the following proceedings were had to wit:

Fourteenth day, March term, 1872.

WEDNESDAY, *Mar. 20th*, 1872.

R. W. ROBBINS *vs.* T. J. BUNN ET AL. } Foreclosure.

This cause is ordered to be continued.

And afterwards, to wit, at a regular term of the said court, in and for said county, begun and held at the court-house in Clinton, in said
8 county, on Monday, the 2nd day of December, A. D. 1873, that being the first Monday of said month.

Present, Hon. Thomas F. Tipton, judge 8 judicial dist.; Jonathan H. Rowell, State's attorney; Thomas Gardner, j'r, sheriff; W'm H. Harrison, clerk.

Among other the following proceedings were had, to wit:

3d day, December term, 1872.

WEDNESDAY, *December 4th*, 1874.

R. W. ROBBINS *vs.* T. J. BUNN ET AL. } Foreclosure.

This cause is ordered to be continued.

And afterwards, at a regular term of the said circuit court, in and for said county, begun and held at the court-house in Clinton, on Monday

the 3d day of March, A. D. 1873, that being the first Monday of said month.

Present, Hon. Thomas F. Tipton, judge 8 judicial dist.; S. K.
9 Carter, State's attorney; Thomas Gardner, j'r, sheriff; W'm H. Harrison, clerk.

Among other the following proceedings were had, to wit:

2nd day, March term, 1873.

TUESDAY, *March 4th*, 1874.

R. W. ROBBINS
vs. } Foreclosure.
T. J. BUNN ET AL.

This cause is ordered to be continued.

And afterwards, at a regular term of the said circuit court, in and for said county, begun and held at the court-house in Clinton, in said county, on Monday, the 1st day of December, A. D. 1873, that being the first Monday of said month.

Present, Hon. Lyman Lacey, judge 17 judicial dist.; Stephen K. Carter, State's attorney; Thomas Gardner, j'r, sheriff; W'm H. Harrison, clerk.

Among other the following proceedings were had, to wit:

Fifth day, December term, 1873.

10 FRIDAY, *December 5th*, 1873.

R. W. ROBBINS
vs. } Foreclosure.
T. J. BUNN ET AL.

This day came complainant, by Williams, his solicitor, and on his motion this cause is referred to the master in chancery of this court to take the proof and make computation herein and report the same to this court.

And afterwards, on the seventh day of January, A. D. 1874, that being one of the regular days of the said December term, A. D. 1873, and the 23d day thereof.

Among other the following proceedings were had, to wit:

R. W. ROBBINS
vs. } Foreclosure.
T. J. BUNN ET AL.

Ordered that this cause be continued.

11 And afterwards, to wit, at a regular term of the said circuit court, in the court-house in Clinton, in said county, on Monday, the 16th day of March, 1874, that being the third Monday of said month.

Present, Hon. Lyman Lacey, judge 17th judicial dist.; Steven K. Carter, State's attorney; Thomas Gardner, j'r, sheriff; W'm H. Harrison, clerk.

On Tuesday, March 17th, A. D. 1871, that being the second day of

said term, there was entered upon the records of said circuit court a decree, in the words and figures following, to wit:

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MAREY E. BUNN, CLIFTON H. MOORE, & David Davis.
} Bill in equity for relief and to foreclose mortgage.

This cause having been appealed to the supreme court from a former decree of this court, and said decree having been reversed and set
12 aside by the supreme court of the State of Illinois, and the cause remanded by said court with instructions to this court to render a decree in accordance with the opinion of the supreme court, and this cause having been again submitted to the court on the same pleadings and proofs as it was heard before; and this court, at this term, having referred this cause to W. H. Harrison, esq., clerk of this court, as special master, to state and report the amount due on said mortgage and note; and the said special master having this day made and filed his report, showing that there is now due on said note and mortgage two thousand and eighty-three dollars; and the said report, having been approved by the court, is ordered to be filed.

And now the court, being fully advised, finds that all the parties defendant have been duly summoned by proper process more than
13 ten days prior to first day of this term of the court, and a decree by default having been entered against all said defendants not appearing, pleading, answering, or demurring to the bill, and that there is now due and owing from the defendant, Thomas J. Bunn, to the complainant, Rufus W. Robbins, on said note the sum of two thousand and eighty-three dollars, and that the said Thomas J. Bunn made the note, and said Thomas J. Bunn and Mary E. Bunn, his wife, made and delivered the mortgage, as stated in the original and amended bill, and that the note was assigned to complainant, as stated in the bill.

The court further finds that no part of said mortgage debt has been paid; that said mortgage is a lien on all the land described in the mortgage, to wit, the S. ½ of the S. E. ¼, and the S. ½ of the S. W. ¼ of section twenty-seven, (27,) township nineteen (19) N., range three (3)
14 east, of 3d P. M., in De Witt County, Illinois, and that the said defendants, Clifton H. Moore and David Davis, have no rights in said land that are not subject to said mortgage.

It is therefore ordered, adjudged, and decreed by the court that unless the said defendant, Thomas J. Bunn, or some one for him, pay to the complainant herein, Rufus W. Robbins, the said sum of $2,083, above found to be due, within twenty days from this date, together with interest thereon at the rate of six per cent. per annum, from and after this date, together with all the costs in this proceeding, that all the land described in the mortgage, or so much thereof as may be sold by the master in chancery of this court to raise money to satisfy this decree and costs of sale, and that said sale, if not redeemed from in accordance with the statute shall divert all the title and interest of any and all the defendants in and to the land so sold and not redeemed from.
15 And that the purchaser, on procuring a deed, shall have the title to such land so sold and deeded, free from all title, interest, or claim of any and all the defendants herein. That the master shall make said sale at public auction, to the highest bidder, at the door of the court-house in Clinton, De Witt County, Illinois, after having advertised the time, place, and terms of sale, together with a description of the land to

be sold, for at least twenty days, in some newspaper published in said town of Clinton, and that said master report his proceedings to this court.

LYMAN LACEY,
Judge.

And on the 17th day of March, 1874, there was filed in the office of the clerk of said circuit court an agreement, in the words and figures following, to wit:

16 Circuit court, De Witt County, Ill's, March term, 1874.

R. W. ROBBINS
vs.
THOMAS J. BUNN ET AL.

It is agreed in this cause that the same may be appealed to the supreme court of this State without bond, and that the same may be heard in the supreme court on the old record in this cause, now in said supreme court, together with a certified copy of the subsequent orders and th decree this day entered in said cause, & this agreement, as no othe evidence was offered on the hearing thereof.

March 17th, 1874.

WILLIAMS & BURR,
For Complainants.
MOORE AND WARNER,
For Respondents Davis & Moore.

STATE OF ILLINOIS,
De Witt County, ss:

I, W'm H. Harrison, clerk of the circuit court within and for
17 said county, do hereby certify that the above and foregoing is a full and complete record of all proceedings had. and complete copy of all papers on file, in a certain cause lately pending in said court, on the chancery side thereof, wherein R. W. Robbins was complainant and T. J. Bunn et al. were defendants, since the order of reversal from the supreme court of this State was filed in said court, and since the former appeal in this cause was taken.

In testimony whereof I have hereunto set my hands and affixed the seal of the said court this 2d day of January, A. D. 1874.

[SEAL.] W'M H. HARRISON, *Clk.*

STATE OF ILLINOIS,
Supreme Court, Central Grand Division:

DAVID DAVIS & CLIFTON H. MOORE ET AL., plaintiffs in error,
vs.
RUFUS W. ROBBINS, DEFENDANT IN ERROR. } Appeal from De Witt.

18 And now come the appellants and assign the following errors upon this record:

1st. The court below erred to the injury of the plaintiffs in error in holding that Davis & Moore's title to S. ½ S. W. sec. 27, T. 19, R. 3 E., was acquired in fraud of Robbins' title.

2d. The court below erred in holding Bunn's pre-emption claim was a valid one.

3d. The court below erred in holding that Mitchell (under whom Davis claims) and Moore had no right to enter this land at the land-office in Danville, Illinois.

4th. The court erred in holding that Robbins in this bill could contest Moore's and Mitchell's entry of this land.

5th. The court erred in decreeing that Davis & Moore's title to this land was subject to the mortgage made by Bunn.

19 6th. The court below erred in not dismissing this bill as to Mitcheli, Davis, & Moore.

C. H. MOORE, *Sol.*

20 Be it remembered that on this day, being the 7th day of January, A. D. 1875, and the 3d day of said January term, 1875, the following order was made in the words and figures to wit:

DAVID DAVIS ET AL. } 206. Appeal from De Witt.
v.
RUFUS W. ROBBINS. }

On this day comes again said appellants, by Mess. Moore and Warner, their attornies, and move the court for leave to file the record of Robbins vs. Bunn, heretofore decided, in this cause, and to make same part of the record in this cause, and the court not being sufficiently advised of and concerning the premises, takes time to consider hereof.

DAVID DAVIS ET AL. } 206. Appeal from De Witt.
v.
RUFUS W. ROBBINS. }

On this day, being the 15th day of January, A. D. 1875, and the 9th day of said January term, come again said parties, and the court being now sufficiently advised of and concerning the premises, it is ordered, that leave is granted to file record of Robbins vs. Bunn et al. herein, and the same to be considered as part of the record herein, which record is in the words & figures following, to wit:

21 RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, and DAVID DAVIS. } Appeal from De Witt.

STATE OF ILLINOIS,
De Witt County, ss.:

Pleas had before the Hon. John M. Scott, judge of the eighth judicia circuit of the State of Illinois, and sole presiding judge of the circuit court of De Witt County, at a regular term of said court, begun and held at the court house in Clinton, in said county, on Monday, the day of May, in the year of our Lord one thousand eight hundred and sixty-six, that being the first Monday in said month.

Present, Hon. John M. Scott, judge; , State's attorney; , sheriff; , clerk.

23 Be it remembered that on the 11th day of April, A. D. 1866, there was filed in the office of the clerk of the said court a certain bill to foreclose a mortgage, which is in the words and figures following, to wit:

Of the May term of the De Witt County circuit court, A. D. 1866.

STATE OF ILLINOIS,
De Witt County, ss:

To the honorable John M. Scott, judge of the eighth judicial circuit, in chancery sitting:

Humbly complaining, your orator, Rufus W. Robbins, of the county of Macon and State of Illinois, would respectfully show unto your honor that one Thomas J. Bunn, of the county of McLean and State of Illinois, heretofore, to wit, on or about the twenty-second day of February, A. D. 1856, borrowed of one Lewis Bunn the sum of one thousand dol-
23 lars, and executed to said Lewis Bunn therefor his promissory note for said sum, payable in three years after date with six per cent. interest, a copy of which said note is herewith filed and asked to be taken as a part of this bill; and for the purpose of securing the payment of said promissory note according to its tenor and effect, he, the said Thomas J. Bunn, and Mary E. Bunn, his wife, then both of the county of De Witt and State of Illinois, being the owners of certain lands hereinafter described, executed to said Lewis Bunn a certain deed of mortgage for said lands, which said deed of mortgage is substantially as follows, to wit:

This indenture, made this twenty-second day of February, in the year of our Lord eighteen hundred and fifty-six, between Thomas J. Bunn and Mary E. Bunn, his wife, of the county of De Witt and State of Illinois, of the first part, and Lewis Bunn, of the county of McLean
24 and State of Illinois, of the second part.

Whereas the said parties of the first part is justly indebted to the said party of the second part in the sum of one thousand dollars, ($1,000,) secured to be paid by a certain promissory note, bearing even date herewith, calling for one thousand dollars, ($1,000,) due and payable in three years from date with six per cent. interest, payable to Lewis Bunn, or order, and signed by Thomas J. Bunn:

Now, therefore, this indenture witnesseth that the said parties of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these
25 presents do grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns, forever, all the following-described real estate lying and being in the county of De Witt and State of Illinois, to wit: The south half of the southeast quarter and the south half of the southwest quarter of section number twenty-seven, (27,) in township number nineteen (19) north of range three (3) east, containing one hundred and sixty acres. To have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in any wise appertaining; and also all the estate, interest, and claim whatsoever, in law as well as in equity, which the parties of the first part have in and to the premises hereby conveyed unto the said party of the second part, his heirs and assigns, and to their only proper use, benefit, and behoof.

26 Provided always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors, or administrators, shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or

assigns, the aforesaid sum of money, with such interest thereon, at the time and in the manner specified in the above-mentioned note according to the true intent and meaning thereof, then, and in that case, these presents and everything herein expressed shall be absolutely null and void.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

THOS. J. BUNN. [SEAL.]
MARY E. BUNN. [SEAL.]

STATE OF ILLINOIS,
McLean County, ss:

I, Andrew W. Rogers, a notary public in and for said county,
27 do hereby certify that the above-named Thomas J. Bunn and Mary E. Bunn, who are personally known to me to be the persons whose names are subscribed to the foregoing mortgage as having executed the same, this day in proper person came before me and acknowledged that signed, sealed, and delivered the said mortgage for the uses and purposes therein mentioned. And the said Mary E. Bunn, wife of said Thomas J. Bunn, having been made fully acquainted with the contents of said mortgage and by me examined separate and apart from her, declared that she signed and acknowledged said mortgage and relinquished her dower in and to the lands thereby conveyed, freely, voluntarily, and without compulsion of her said husband.

In testimony whereof I have hereunto set my hand and official seal this twenty-second day (22nd) of February, 1856.

ANDREW ROGERS,
Notary Public.

28 Which said mortgage your orator would show was afterwards, to wit, on the third day of March, A. D. 1856, duly recorded in the proper clerk's office of the said county of De Witt, in book of mortgages No. 1, page 189, by one Robert Lewis, the then clerk of the circuit court of said county and ex officio recorder of deeds.

Your orator would further show that afterwards, to wit, on the day and year aforesaid, the said Lewis Bunn, to whom or to whose order the said sum of money in the said promissory and mortgage specified was to be paid, before the payment of the same assigned the said promissory note & mortgage to your orator, a copy of which said assignment is herewith filed and asked to be taken as a part of this bill, who is now the lawful owner and holder of the same.

Your orator would further show unto your honor that although the said promissory note has long since been due and payable ac-
29 cording to its tenor and effect, that the said sum of money therein specified, to wit, the said sum of one thousand dollars, still remains due and unpaid, and no part or parcel of the same, or any of the interest accrued thereon, has been paid, but the whole remains unpaid, whereby the said deed of mortgage has become forfeited to your orator and his right of foreclosure has accrued.

Your orator would further show unto your honor that he is informed that one Clifton H. Moore, of the county of De Witt, has some pretended claim in or to some portion of said described lands, to wit, that he pretends to own the same by virtue of a pretended purchase of the same from the Government of the United States, but your orator would show unto your honor that the said lands at the time of the execution of the said note and the execution and delivery of the said mortgage was
30 the property of the said Thomas J. Bunn, and that he had full

right and authority to sell and convey the same by his own deed of mortgage.

Your orator would show unto your honor, that there is now due and unpaid upon said note and mortgage the sum of one thousand six hundred and seven dollars. In consideration of the premises, your orator would pray that process of summons may issue herein at the suit of your orator and against the said Thomas J. Bunn and Mary E. Bunn and Clifton H. Moore, directed to the sheriff of McLean County, and returnable to the above term of said court, and also summons to the sheriff of De Witt County, returnable as above; that the said defendants be required to answer fully and particularly the allegations of this bill, as if thereunto specially interrogated, but not under oath, that being hereby expressly waived.

31 Your orator would further pray that an account may be had herein as to the amount due your orator upon the said note and mortgage, and that your honor, upon a hearing of this cause, shall order, adjudge, and decree that the said Thomas J. Bunn shall, within a day to be named, pay to your orator the said some of money so found to be due him; and in default of such payment that your honor will order, adjudge, and decree a full foreclosure of said mortgage, and that the said lands therein described shall be by the master in chancery for said county of De Witt advertised and sold at public sale to satisfy the amount of said decree.

And your orator would pray for all such special and general relief as shall from the facts to be proved in this cause seem to be meet and just; and as in duty bound, your orator will ever pray, &c.

RUFUS W. ROBINS,
By A. B. BUNN, *Sol.*

32 *Copy of note mentioned in said mortgage.*

BLOOMINGTON, *Feb'ry 22nd*, 1856.

Three years after date, I promise to pay Lewis Bunn, or order, one thousand dollars for value received, with six per cent interest.

THOS. J. BUNN.

(Indorsed on the back of said note:)

I hereby assign all my right, title, & interest in the within note to R. W. Robbins.

LEWIS BUNN.

Copy of assignment on the back of said mortgage.

I hereby assign all my right, title, & interest in the within mortgage to R. W. Robbins.

LEWIS BUNN.

Whereupon there issued out of said court a summons, which is in the words and figures following, to wit:

STATE OF ILLINOIS,
De Witt County, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

33 We command you that you summon Thomas J. Bunn and Mary E. Bunn & Clifton H. Moore, if they shall be found in your county, personally to be and appear before the circuit court of said county on the

first day of the next term thereof, to be holden at the court-house in Clinton, in said De Witt County, on the first Monday of May next, to answer unto Rufus W. Robbins, in his certain bill of complaint to foreclose a mortgage filed in said court on the chancery side thereof, and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, Joseph J. Kelly, clerk of said court, and the seal thereof, at Clinton, this 12th day of April, A. D. 1866.

[SEAL.] JOSEPH J. KELLY, *Clerk.*

[50 cents int. rev. stamp cancelled.]

Which summons was returned with the following endorsement, to wit

34 STATE OF ILLINOIS,
De Witt County, ss:

I have duly served this writ by reading and delivering a true copy of the same to Clifton H. Moore, on this 16th day of April, A. D. 1866.

Thomas J. Bunn and Mary E. Bunn not found in this county.

A. D. McHENRY, *Sheriff,*
By W. H. STORY, *Dep'ty.*

(The writ issued to sheriff of McLean County on same date not among the files.

Clerk.)

And afterwards, to wit, on the 10th day of May, A. D. 1866, that being the fourth day of the regular May term of said court, and present as before named, the following order was entered of record:

RUFUS W. ROBBINS, *vs.* THOMAS J. BUNN. } Bill to foreclose.

35 On motion of complainant, by his attorney, leave is granted to the sheriff of McLean County to amend his return on the writ issued herein.

And afterwards, to wit, on the 8th day of September, A. D., 1866, there was issuep out of the office of the clerk of said court a summons directed to the sheriff of McLean County, which said summons is in the words and figures following, to wit:

STATE OF ILLINOIS,
De Witt County:

The people of the State of Illinois to the sheriff of McLean County, greeting:

We command you that you summon Thomas J. Bunn and Mary E. Bunn, impleaded with Clifton H. Moore, if they shall be found in your county, personally to be and appear before the circuit court of said county on the first day of the next term thereof, to be holden at
36 the court-house in Clinton, in said De Witt County, on the first Monday of November next, to answer unto Rufus W. Robbins in his certain bill of complaint to foreclose a mortgage filed in said court on the chancery side thereof, and have you then and there this writ,

with an indorsement thereon in what manner you shall have executed the same.

Witness Joseph J. Kelly, clerk of said court, and the seal thereof at Clinton, this eighth day of September, A. D. 1866.

[SEAL.] JOSEPH J. KELLY,
Clerk.

Which said summons was returned with the following indorsement, to wit:

STATE OF ILLINOIS,
McLean County, ss:

I have duly served this writ by reading and delivering a true copy of the same to Thomas J. Bunn & Mary E. Bunn this 20th day of September, 1866.

H. A. EWING,
Sheriff.

37 And afterwards, to wit, at a regular term of said court begun and held at Clinton, in said county, on Monday, the fifth day of November, A. D. 1866.

Present, Hon. Jno. M. Scott, Judge Henry S. Greene, state's attorney, Alonzo D. McHenry, sheriff, Joseph J. Kelly, clerk.

On the second day of said term, that being the 7th day of November, the following order was entered of record:

RUFUS W. ROBBINS
vs. } Foreclosure.
THOMAS J. BUNN ET AL.

And now on this day came the complainant by A. B. Bunn, his solicitor, and on his motion respondents are ruled to answer herein on or before the 1st day of March next, and complainants have leave to reply, and this cause is continued.

38 And afterwards, to wit, on the 25th day of February, 1867, Clifton H. Moore, one of said defendants, filed in said court his separate answer to said bill, which is in words & figures following, to wit:

The separate answer of Clifton H. Moore to the bill filed against him & others by Rufus W. Robbins.

This respondent, saving & reserving unto himself all and all manner of exception which can be taken to the many and manifest errors & misstatements in said bill contained, for answer to so much of said bill as it is material for him to answer, answering says:

That as to the making of said note and mortgage in said bill mentioned he knows nothing & therefore denies the same; and your respondent further answering charges the truth to be that no one
39 thousand dollars was paid by the said Lewis Bunn on the 22nd day of Feb., 1856, and that the whole transaction, if any such was made, was for the sole and only purpose of hindering & delaying the creditors of the said Thomas J. Bunn from collecting their just debts. Your respondent further charges the truth to be that said note is now fully paid & cannot be produced.

Respondent, further answering, denies, that the copy of said mortgage & acknowledgment is correctly set out in said bill. Respondent further answering denies that the said Lewis Bunn ever indorsed the said note to the said complainants delivered the same.

This respondent, further answering, denies that no part of the said note or the interest thereon was ever paid, but, on the contrary, avers that the said note is fully paid.

This respondent further answering expressly admits that he
40 does claim a part of the land in said bill mentioned, to wit: the S. W. S. W. ¼ of sec. 27, T. 19, R. S. E., which he holds by a patent title from the General Government, that he entered said land at the land-office in Danville, Illinois, on or about the day of , 1854, and has paid all taxes assessed upon the same for a space of at least seven years before the filing of this bill.

Respondent, further answering, denies that the said Thomas Bunn, at the time he executed the said mortgage, owned the said land described therein, or had full right to sell convey the same; but, on the contrary thereof, this respondent insists that if the said Thomas J. Bunn had any interest in said land the same was falsely & fraudulently obtained, & of no effect as against the title of this respondent, & so known to the said Robbins at the time he purchased the said mortgage.

41 This respondent, further answering, says ever since he purchased the said land the same has been assessed either in the name of this respondent or in the name of Davis & Moore and paid by this respondent, and no one has attempted to interfere with the legal rights of your respondent in the said forty acres.

And now, having fully answered, he prays to be discharged with his costs most unreasonably sustained.

C. H. MOORE.

C. H. MOORE, *pro* se.

To which answer the complainant afterwards, on the 8th day of November, 1867, filed the following exceptions:

Circuit court, November term, A. D. 1867.

STATE OF ILLINOIS, *De Witt County:*

RUFUS W. ROBBINS } In chancery.
vs.
THOS. J. BUNN. }

42 And the said complainant, by leave of the court, excepts to the following part of the answer of the defendant, for the reasons herein set forth.

Complainant excepts to this part of the answer of *complainant* commencing after the figures 1856, on the 13th line from the top of the first page of the answer, and proceeding as follows: "And that the whole transaction, if any such was made, was for the sole purpose of hindering & delaying the creditors of the said Thomas J. Bunn from collecting their just debts."

Complainant excepts to the above part of the answer for the reason that respondent does not say or charge in the said answer that at the time of making the said mortgage the said mortgagor Bunn was indebted to any one except the said mortgagee; nor does the respondent say that he is now, or was then, or ever has been a creditor of the said

Bunn, or the said mortgage was made or contrived to hinder or
43 delay the said respondent or any one in privity with him in the collecting of any debt or claim that he had or might have had against the said Bunn.

Complainant excepts to the following part of the answer, commencing on the 12th line from the bottom of the 2nd page of the answer, as follows: "Respondent, further answering, denies that the said Thomas J. Bunn at the time he executed the said mortgage owned the said land therein described, or had full right to sell convey the same, but, on the contrary thereof, this respondent insists that if the said Thomas J. Bunn had any interest in said land, the same was falsely and fraudulently obtained, & of no effect as against the title of this respondent, & so known to the said Robbins at the time he purchased the said mortgage."

Respondent excepts to the above part of the answer, because it
44 is too vague and indefinite, and does not set out or give this *respondent* notice of what the fraud consists, or wherein the said title of the said Bunn was obtained by fraud, or from whom it was obtained, and does not set out the facts to put this complainant upon notice sufficient to meet any proof that may be offered of any fraud in the said Bunn in obtaining said title, nor does it show in what way the said respondent is in any way prejudiced by said fraud, if any exists.

Complainant further excepts to the concluding charge of said answer as to the payment of taxes, and how the said land was assessed, and to that part that says that "no one has attempted to interfere with the legal rights of your respondent in the said forty acres," for the reason that it is wholly immaterial.

Complainant also excepts to this part of the answer on the 2nd
45 page, as follows: "And has paid all taxes assessed upon the same for a space of at least seven years before the filing of this bill," for the reason that it is wholly immaterial who has paid the taxes on the land for anything shown in this answer, and because the said parts of the said answer are immaterial to the issue in this cause, and are impertinent and too vague and indefinite to put this complainant upon notice to prepare proofs to meet the same.

This complainant excepts to the same, and prays the court to cause the said excepted parts to be stricken from the answer.

WILLIAMS & BURR,
For Complainant.

And afterwards, to wit, on the 10th day of April, 1868, the complainant filed in the clerk's office of said court his amendment to the original bill herein, which said amendment is in words and figures following, to wit:

6 Circuit court, May term, 1868.

STATE OF ILLINOIS, *De Witt County:*

RUFUS W. ROBBINS
vs.
THO'S J. BUNN, MARY E. BUNN, & CLIFTON H. MOORE. } In chancery, to foreclose a mortgage.

And now the said complainant, by his solicitors, amends his original bill in this behalf by leave of the court, and by way of amendment says: that the said defendant, Clifton H. Moore, long after the said

Thomas J. Bunn had located upon the said land in the original bill described, and had acquired a right to pre-empt the same, the said Moore pretended to enter the S. W. ¼ of the S. W. ¼ of section 27, town. 19, R. 3 E., and the Commissioner of the General Land Office issued by mistake to said Moore a patent to said forty acres. But
47 orator avers that said Bunn had previously entered the same under the laws of the United States, and had paid for the same.

Orator further shows unto your honor, that at the time said Moore made his pretended entry of said 40 acres, that he had full notice that the said Bunn claimed the right to said land as a pre-emptor, and at the time said Moore obtained his patent to said land he well knew that said Bunn had paid for said land as a pre-emptor, and that said Bunn was the owner of said land, and entitled to a patent for the same.

Orator would further show that said Moore had, previous to his obtaining said patent, contested, in due form of law, the right of said Bunn to pre-empt said land before the register and receiver of the United States land-office at Springfield, Ill., and that the right of said Bunn to pre empt said land was settled and adjudicated in favor of said
48 Bunn by said register and receiver.

Said Moore appealed from the decision of said register and receiver to the Commissioner of the General Land Office, and the Commissioner reversed the decision of the register and receiver, and said Bunn appealed from the decision of the Commissioner to the Secretary of the Interior, and the Secretary of the Interior of the United States reversed the decision of the Commissioner and affirmed the decision of the register and receiver, which last decision has never been reversed, revoked, remanded, or in any wise set aside, but is in full force in law and equity; and the Commissioner of the General Land Office has ordered the said Moore to return his patent to said land to the General Land Office, so that it might be cancelled, and a patent issued to the same to the said Bunn; but said Moore has refused to return said patent, and now holds the same in bad faith.

49 Orator would show that the title to said 40-acres tract from the United States as between said Bunn and said Moore, has been adjudicated by the only court having jurisdiction of the matter, to wit, the register and receiver of the land office, and found to be in said Bunn, and that said Moore holds the legal title to said 40 acres in trust for said Bunn and orator claiming under him.

Orator would further show that one David Davis claims to have some kind of title to or interest in some part of said land. But orator avers that said Davis has no title to or interest in any of said lands as against the said Bunn, or this complainant. Orator prays that said Davis, who is a resident of the county of McLean, and State of Illinois, be made defendant hereto and summoned to answer this bill, the same as the other defendants, and upon the final hearing in addition to the
50 relief prayed for in the original bill. Orator prays for a decree that said Clifton H. Moore convey to said Bunn the legal title to said forty acres which the said Moore now holds as a trustee in bad faith for said Bunn, and for a further decree cancelling, as a cloud on the title of said Bunn, any pretended title that said Davis may have to said lands.

Orator is informed that said Davis claims part of said land by virtue of a sale by the marshal of the southern district of Illinois, on a judgment in the circuit court for the southern district of Illinois, against some one who had an interest in said land subject to sale. And orator avers that said master's deed, which is of record, is a cloud upon the

title of said Bunn, and would be a cloud upon the title of orator should he foreclose the same under his mortgage. Wherefore orator prays for a decree that said deed, as to all the tract in the bill, be cancelled and set aside as a cloud on the title of said Bunn in said land, and for equity & general relief, and as in duty bound, &c.

WILLIAMS & BURR,
Compl'ts Sol's.

51 And afterwards, to wit, on the 20th day of April, 1868, there was issued out of said court a summons which is in words and figures following, to wit:

STATE OF ILLINOIS,
De Witt County, ss:

The people of the State of Illinois to the sheriff of McLean County, greeting:

We command you that you summon David Davis, impleaded with Thomas J. Bunn, Mary E. Bunn, & Clifton H. Moore, if he shall be found in your county, personally to be and appear before the circuit court of De Witt County on the first day of next term thereof, to be holden at the court-house in Clinton, in said De Witt County, on the first Monday of May next, to answer unto Rufus W. Robbins in his certain bill of complaint to foreclose a mortgage filed in said court on the chancery side thereof; and have you then and there this writ,
52 with an indorsement thereon in what manner you shall have executed the same.

Witness Joseph J. Kelly, clerk of said court, and the seal thereof, this 20th day of April, A. D. 1868.

[SEAL.] JOS. J. KELLY, *Clerk.*

Which said summons was returned endorsed as follows, to wit:

STATE OF ILLINOIS,
McLean County, ss:

I have duly served the within writ by reading and leaving a true copy of the same with George P. Davis, a white person, and member of the family over 12 years of age, for the within-named David Davis, at his usual place of residence, after explaining the contents thereof to him, this 23d day of April, A. D. 1868.

ED. M. PIKE, *Sheriff,*
By J. H. PIKE, *Deputy.*

And afterwards, to wit, at a regular term of said court begun
53 and held at the court-house in Clinton aforesaid on Monday, the 4th day of May, A. D. 1868, that being the first Monday in said month. Present, as before.

On Tuesday, the second day of said term, the following order was entered of record.

RUFUS W. ROBBINS
vs. } Foreclosure.
THOMAS J. BUNN ET AL.

And now comes the complainant, by R. E. Williams, his solicitor, and, on his motion, the respondents are ruled to answer the bill on or

before Sept. 1st next, and leave is given the complainant to reply thereto, and this cause is continued.

Whereupon the respondents, on the 27th day of August, A. D. 1868, came and filed their answer to said bill, which said answer is in words and figures following, to wit:

54 The separate answer of Clifton H. Moore to amended bill filed against him in the circuit court of De Witt County, Illinois.

This respondent, saving & reserving unto himself all and all manner of exceptions that can be taken to the many errors & misstatements in said bill contained, for answer to so much of said bill as he is informed it is material for him to answer, answering, says: That it is untrue that this respondent, long after the said Bunn had located upon said land, & acquired the right to pre-empt the same, pretended to enter said S. W. of the S. W. of sect. 27, T. 19, R. 3, & that the commissioner issued by mistake a patent for said forty to said Moore; but this respondent avers that his entry was first in point of time, & that when this respondent entered said tract of land no valid pre-emption was thereon, nor was there any notice filed in the land-office at Danville, Illinois;

55 that said land was claimed by said Bunn, nor did the said Bunn ever live on said land with the intention of making it his home; that no improvements whatever were on said land when this respondent entered the same, nor for some months afterwards.

Respondent, further answering, says that it is untrue that this respondent had notice of said Bunn's entry at the time this respondent entered said lands, but this respondent avers the truth to be that said land was offered at public sale by the said land-office at Danville, Ill., & this respondent bid off the same at a few cents over $2.50 per acre, and no pre-emption claim was then filed, or known to be in existence; that as to what was decided at the land-office at Springfield he has no knowledge, only that a patent was in due time sent this respondent for said S. W. S. W. of sect. 27, T. 19, R. 3 E., which said patent, so delivered to this respondent, was the end of all adjudication at

56 said Land Office at Washington City, D. C., and to which said patent this respondent will refer on the hearing hereof.

Respondent, further answering, denies that he ever knew that the said Bunn was the owner of said forty acres, or lawfully entitled to a patent therefor, but on the contrary thereof, respondent avers that the said Bunn never was a bona fide pre emptor on said lands, nor was he ever entitled to a patent for said land.

This respondent, further answering, denies that the various land-officers have decided that the said land belonged to said Bunn, & not to this respondent, but on the contrary the said General Land Office, at Washington, issued and delivered to this respondent a patent for said tract, & that your orator's title is the oldest, best, & only legal title to said tract, and that after a patent is issued, no further adjudica-

57 tion can be made by the various land officers, and that respondent has paid all the taxes on said land for seven years successively.

Affiant, further answering, says that it is not true that this respondent submitted his title to the adjudication of the Land Office at Washington, but that this respondent, as attorney for John P. Mitchell, who had entered the remaining part of the land in orator's bill named, did submit an argument for his client in said cause.

And now having fully answered both complainants' bill & amended

bill, both of which said answers he prays to be taken as one answer, and all allegations not admitted are expressly denied, he prays to be hence discharged with his reasonable costs herein most unjustly sustained.

C. H. MOORE, *pro se.*

The answer of David Davis to the bill filed against him & others by Rufus W. Robbins, in the circuit court of De Witt County, Illinois.

58 This respondent, saving & reserving unto himself all and all manner of exception which may be taken to the many manifest errors & misstatements which are in said bill contained, for answer to so much as he is informed it is material for him to answer, answering, says:

That he has no knowledge about any of the statements in said bill, nor has he any information or means of information about the claim of the said Bunn to the land in said bill; he therefore expressly denies each and every allegation in said bill in regard to said Bunn's pre-emption, or his entry, or his right to enter said land, & all other allegations made or intended to strengthen the complainant's title or injure this respondent's title to the S. E. of S. W. ¼ of sect. 27, T. 19, R. 3 E.; and avers that said mortgage has been satisfied & merged in complainant's title, & that he
59 has no right to file this bill, & alleges that the said Bunn never did have a pre-emption right to the above tract, nor did he ever enter the same & obtain a patent therefor, & that any claim or right he has or pretends to have against the said land was a fraud upon the rights of one John P. Mitchell, under whom this respondent claims.

This respondent, further answering, admits that he has an interest in one of the tracts in said bill mentioned, which was acquired in this manner: One John P. Mitchell, without any knowledge of any pre-emption or other claim on said land by said Bunn, & before any such claim was made at the land office at Danville, Ill., entered said land, buying the same at public sale of said land officers at Danville, Ill., and paying them for said tract something over $2.50 per acre for said forty. That afterwards, & some time in the year 185 , a firm by the name of Avery, Butler & Cecil, in the circuit court of the United
60 States at Springfield, Illinois, obtained a judgment against the said John P. Mitchell and one Joel E. King for about the sum of $2,065.74 and costs of suit. That afterwards an execution was issued on said judgment, & by the marshal of said court levied on the lands in this answer described, amongst other lands, as the lands of John P. Mitchell, and was by him sold at public sale at Springfield, & was then and there bid off by the att'y for the plaintiff for the plaintiff's benefit, and that the tract claimed by respondent after it was sold not being redeemed, a deed was made by the marshall of the U. S. court at Springfield, under the order of said court, to Theron R. Butler, one of the plaintiffs in said cause, who afterwards conveyed the said forty, to wit, S. E. S. W. ¼ 27, T. 19, R. 3 E, for a valuable consideration, to this respondent, who now owns and lawfully holds the same. Re-
61 spondent here avers that, at the time the said judgment was obtained, both plaintiff & defendant Mitchell supposed and believed that said Mitchell's title to said tract was good, & that the said Butler was an innocent purchaser without any knowledge of said Bunn's claim on said lands; that there was no actual or constructive notice of the claim of said Bunn to said forty acres.

This respondent, further answering, says, that after the said land was so entered by the said Mitchell, the said Mitchell, or those claiming under him, have paid all the taxes on said land for several successive

years. This respondent, therefore, the benefit of the statute in such cases made and provided.

This respondent, further answering, says that all other allegations in said bill not herein admitted are expressly denied, the same as if separately replied to; and now having fully answered he prays to be hence discharged with his costs.

62 DAVID DAVIS.

C. H. MOORE, *Sol.*

And afterwards, to wit, on the 19th day of November, 1868, the complainant came and filed his replication to said answers, which said replication is in words and figures following, to wit:

Of the May term, A. D. 1867, of the circuit court of De Witt County.
In chancery.

STATE OF ILLINOIS,
County of De Witt, ss:

RUFUS W. ROBBINS }
vs.
T. J. BUNN ET AL. }

And now comes the said complainant, by his solicitors, Williams & Burr, and for replication to the separate answer of C. H. Mooe & David Davis, the defendants in said cause, filed herein, says that the matters and things in said answer set forth, except so far as the same admit the allegations of complainant's bill, are incorrect and untrue, and
63 that the allegations of said bill are true, as complainant will prove on a hearing herein.

WILLIAMS & BURR,
Solicitors for Complainant.

And afterwards, to wit, at a regular term of said court, begun and held at the court-house in Clinton aforesaid, on Monday, the 3d day of May, A. D. 1869, that being the first Monday of said month.

Present, Hon. John M. Scott, judge; J. H. Rowell, State's attorney; A. D. McHenry, sheriff; Wm. L. Chambers, clerk.

On Tuesday, the second day of said term, the following order was entered of record, to wit:

R. W. ROBBINS }
vs. } Forec'osure.
T. J. BUNN. }

This cause is referred to the master in chancery to take testimony herein.

64 And afterwards, to wit, on the 28th day of May, that being the 25th day of said term, the following was entered of record, to wit:

R. W. ROBBINS }
vs. } Foreclosure.
T. J. BUNN ET AL. }

This day came the complainant, by Williams & Burr, his solicitors, and the respondents, Thomas J. Bunn & Mary E. Bunn, having been

three times solemnly called, came not, but herein wholly make default, and thereupon complainant's bill is taken for confessed as against them.

And now this cause, coming on to be heard upon the bill, answer of the other respondents, and replication thereto, and the court not being sufficiently advised, doth take the same under advisement.

And afterwards, to wit, on the 4th day of June, that being the
65 32nd day of said term, the following order was entered of record:

R. W. ROBBINS
vs.
T. J. BUNN ET AL. } Foreclosure.

It is ordered by the court that the hearing of this cause be continued, and leave is hereby given to either party to introduce new evidence.

And afterwards, at a regular term of said court, begun and held at the court-house in Clinton, in said county, on Monday, the first day of November, A. D. 1869, that being the first Monday in said month, and present as last aforesaid.

On Friday, the 19th day of said term, the following order was entered of record, to wit:

RUFUS W. ROBBINS
vs.
T. J. BUNN ET AL. } Foreclosure.

66 It is ordered by the court that this cause be referred to the master in chancery to make the computation of the amount due herein.

And afterwards, to wit, on the 23d day of said term, the master in chancery filed his report of the amount due herein, which was approved by the court and ordered to be filed, and which is in the words and figures following, to wit:

In the circuit court, November term, A. D. 1869. In chancery.

STATE OF ILLINOIS, *De Witt County:*

RUFUS W. ROBBINS
vs.
T. J. BUNN ET AL. } Bill to foreclose mortgage.

To the Hon. John M. Scott, judge of said court:

The undersigned, having been by the court appointed to make computation in the above entitled cause, would respectfully report
67 that he has performed the duty assigned him, and finds that there is now due on the note and mortgage on file in said cause the sum of eighteen hundred and twenty-four dollars and fifty cents, ($1,824.50.)

And now, having fully reported, he submits this his report to the court for approval.

Nov. 19th, 1869.

MICHAEL DONAHUE,
Master in Chancery.

On the same day the following decree was entered of record, to wit:

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, & David Davis.
} Bill in chancery to foreclose a mortgage.

And now this cause coming on, and it appearing to the court that the defendants, Thomas J. Bunn and Mary E. Bunn, have been duly
68 served with process more than ten days before the commencement of this court, and the said Thomas J. Bunn and Mary E. Bunn having failed to appear and plead, answer or demurr, to the said bill, on motion of the solicitor for the complainant, a default is entered against them, and as to them the bill is taken as true. And the cause coming on to be heard on the bill, amended bill with their exhibits, and the answers of the defendants, Clifton H. Moore and David Davis, and the replication of the complainant to said answer, and the default of said Bunn and wife, and the proof, both written and oral, as set forth in the certificate of evidence; and now the court, being fully advised, find that the said Thomas J. Bunn made the note as stated in the bill, and that the said Thomas J. Bunn and Mary E. Bunn made and acknowledged and delivered the mortgage, and that said Lewis Bunn, the payee of said note, sold and indorsed the same to the com-
69 plainant, as stated in the bill, and that said note remains wholly unpaid, and the amount of said note, with interest, is now due and owing from the said Thomas J. Bunn to the complainant; and because the court is not advised as to the amount due on said note and mortgage, the court refers it to the master in chancery to report the amount due on said note; and the said master having made his report that there is now due and unpaid on said note the sum of one thousand eight hundred and twenty-four dollars and fifty cents, which report is approved by the court; and now, the court being fully advised, finds that there is now due and owing upon said mortgage, from the said Thomas J. Bunn to the complainant, said sum of $1,824.50. The court further finds that said mortgage is not a lien on the S. W. ¼ of the S. W. ¼ of section 27, town. 19 N., R. 3 E., 3d P. M., and as to said S. W. ¼ of
70 the S. W. ¼ of sec. 27, town. 19 N., R. 3 E., the bill is hereby dismissed. The court further finds that said mortgage is a lien on all other lands described in said mortgage and bill, to wit: The south half of the southeast quarter and the S. E. ¼ of the S. W. ¼, all in section twenty-seven, town. 19 N., R 3 east, 3d P. M.

And it is ordered and decreed by the court that, unless the defendant, Thomas J. Bunn, or some one for him, shall, within twenty days from this date, pay to the complainant the said sum of $1,824.50, with interest thereon at the rate of six per cent. per annum from and after this date, together with his costs in this behalf expended, that the master in chancery in this court shall, after having advertised in some newspaper published in De Witt County, Illinois, the time, place, and terms of sale, together with a description of the property to be sold, for at least 20 days before the day of sale, proceed to sell at the court-house

71 door of said De Witt County, between the hours of 9 o'clock a. m. and 4 o'clock p. m. of the day of sale, said south half of the southeast quarter, also the S. E. ¼ of the S. W. ¼ of section 27, town. 19 N., R. 3 E., 3d P. M., or so much thereof as may be necessary to pay said sum so found to be due to complainant, with interest thereon as beforesaid, and all the costs of this proceeding, including the costs of sale, and shall pay the surplus, if any, to the said Thomas J. Bunn, and shall issue to the purchaser or purchasers a certificate or certificates of purchase entitling him or them to a deed, unless the land shall be redeemed within fifteen months from the day of sale, and shall make report to this court of his proceedings herein; and this cause is continued for further orders in the premises.

Approved.

JOHN M. SCOTT, *Judge.*

72 And afterwards, to wit, on the day and year last aforesaid, the following was entered of record, to wit:

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, & DAVID DAVIS. } Foreclosure.

This day came again the complainant, by Williams & Burr, his solicitors, and the respondents, David Davis and C. H. Moore, by C. H. Moore, their solicitor, and both complainants and respondents pray an appeal to the Supreme Court, which is granted by consent without bond being filed by either party, and tender their certificate of the evidence herein, and ask that the same may be signed and made a part of the record in this cause, and it is so done.

Which said certificate of evidence is in words & figures following, to wit:

73 Circuit court, November term, 1869.

ROBBINS
vs.
BUNN ET AL.

Be it known that on the hearing of this cause the complainant introduced as evidence on his part the note and mortgage herein, and also the copies of proceedings at the land-offices, one certified by the Commissioner of the Gen'l Land Office & the other by the register of the land office at Springfield.

Copy of proceedings certified by the Commissioner of the Gen'l Land Office.

No. 19160.] LAND OFFICE AT DANVILLE, ILLINOIS, *February 20th*, 1856.

It is hereby certified that, in pursuance of law, Thomas J. Bunn, of De Witt County, State of Illinois, on this day purchased of the register of this office the lot on south half of the southeast quarter and south half of southwest ¼ of section No. twenty seven, in township
74 No. nineteen N., of range No. three east, containing one hundred and sixty acres, at the rate of two dollars and fifty cents per acre, amounting to four hundred dollars, for which the said Thomas Bunn has made payment in full, as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Thomas Bunn shall be entitled to receive a patent for the lot above described.

JOHN N. DRAKE,
Register.

(Written across the face:)
G. L. O. Cancelled. See letter to R. and R., Sept. 30, 1858.
G. L. O. Reinstated. See letter to R. and R., June 29, 1860.

On the back of the foregoing certificate is the following words and figures, to wit:

G. L. O. Cancelled—illegal pre-emption. R. R. directed to notify party to apply for return of purchase-money, (duplicate receipt herewith.) See letter to R. and R., Sept. 30, 1858.

B. F. S.

G. L. O. Reinstated June 24th, 1860, in pursuance of Secretary's letter of June 22d, 1860.

B. F. S.

75 Duplicate rec't 19160, returned to M'r Bunn. See his letter to this office, dated April 7th, 1857.

Copy of affidavit required of pre emption claimant.

I, Thomas J. Bunn, claiming the rights of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of public lands, and to grant pre-emption rights," approved September 4th, 1841, to the S. ½ S. E. qr., & S. ½ S. W. quarter of section number 27, of township number 19 N., of range number 3 east, subject to sale at Danville, Illinois, do solemnly swear that I have never had the benefit of any pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my
76 own exclusive use or benefit; and that I have not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which I may acquire from the Government of the United States should endure in whole or in part to the benefit of any person except myself.

THOMAS J. BUNN.

I, William E. Russell, of the land-office at Danville, Ill's, do hereby certify that the above affidavit was taken and subscribed before me, this 20th day of Feb., A. D. 1856.

WM. E. RUSSELL, *Rec'r.*

DEPARTMENT OF THE INTERIOR,
June 22d, 1860.

SIR: In the case submitted with your report of 27th Feb'y last, wherein C. H. Moore contests the pre-emption entry of Thomas J. Bunn, in the late Danville district, Illinois, I concur in the conclusions of the register & receiver at Springfield, of the 20th of January, 1858, sus-
77 taining the entry of Bunn. In regard to this case, as simply one between the United States and the pre-emptor, Moore having made his adverse entry at the time when the records of the land office showed

that Bunn was a claimant for the same land by pre-emption, and upon complying with the requirements of the act Sept. 4th, 1841, would have a superior right.

Under the circumstances, as shown by the testimony brought out in the reinvestigation, there can be no doubt of the bona fides of Bunn, and the connection between his first acts and subsequent settlement and improvements I consider sufficient to warrant the issuing of the patent in his favor.

Herewith I return the papers in the case.

Very respectfully, your ob't serv't,

J. THOMPSON,
Secretary.

78 The COMMISSIONER OF THE GEN'L LAND OFFICE.

GEN'L LAND OFFICE, *June 29th*, 1860.

REGISTER & RECEIVER, *Springfield Illinois:*

GENTLEMEN: The Hon. Sec'y of the Interior having decided the case of T. J. Bunn vs. C. H. Moore, embracing the S. ½ S. E. ¼ and S. ½ S. W. ¼, 27, 19, 3, in favor of Bunn, I have to inform you of that fact and to say further, that a patent having been issued to Moore for a part of this tract, viz, W. ½ S. W. ¼ 27, 19, 3, Mr. Bunn can make application to the United States courts for the district in which the land is situated to have the patent set aside; when that is done then a patent will issue to him, Bunn, for the entire tract. Should he prefer, however, to
79 take the remaining 120 acres, you are hereby authorized to issue a new certificate for that portion not encumbered by the patent. In that event you will direct Mr. Bunn to make application for the return of his purchase-money advanced for the 40 acres already patented to Moore.

This patent above referred to was issued to Moore during the interim between the cancellation of Bunn's pre emption entry and the appeal of Bunn from the decision of this office. That decision being now reversed by the Hon. Sec'y of the Interior, I have this day written to Moore calling upon him to return the patent to this office that a patent may issue to Bunn for the entire tract.

Respectfully, &c.

JOS. S. WILSON,
Commissioner.

80 GENERAL LAND OFFICE,
June 29, 1860.

C. H. MOORE,
Clinton, Illinois:

SIR: The Hon. Secretary of the Interior having decided the case of T. J. Bunn vs. C. H. Moore in favor of Bunn, I have to request you to return to this office cash patent No. 17864, embracing the west ½, S. W. ¼, sec. 27, 19, 3, Springfield, late Danville, Ill's, which was transmitted to you on the 21st February, 1859.

Very respectfully,

JOS. S. WILSON,
Commissioner.

In the matter of the pre-emption claim of Thomas J. Bunn, held on the 20th day of January, 1858, before the register & receiver of the land office at Springfield, Illinois, in pursuance of an order from

81 the Commissioner of the General Land Office, under date October 13, 1857, ordering a reinvestigation of said Thomas J. Bunn's right to a pre-emption on the S. ½ of the S. E. ¼ and the S. ½ of the S. W. ¼ of section 27, town. 19 N., range 3, E. of the 3d principal meridian, held at the instance of C. H. Moore.

After due notice had been given, the parties appeared, and the following evidence was given, to wit:

Joseph P. Winslow, Peter Folsom, and George D. Smallwood, after being duly sworn, deposes and says:

PETER FOLSOM, being called on the part of the plaintiff, says:

Ques. 1. State your name, age, occupation, and place of residence.

Ans. My name is Peter Fulsom, age 40 years, occupation surveyor, residence Bloomington.

82 Ques. 2. If you are acquainted with Thomas J. Bunn, state when & where. How long have you known him?

Ans. I have known him for ten years, in the State of Illinois.

Ques. 3. Where did Thomas J. Bunn reside during your acquaintance with him?

Ans. The most of the time in Bloomington.

Ques. 4. Where has Thomas J. Bunn resided for the last 3 or 4 years?

Ans. According to the best of my knowledge, he has resided at Bloomington. He may have been gone a portion of the time—say 2 or 3 months at a time.

Ques. 5. If Thomas J. Bunn has a family, where do they reside?

83 Ans. I understand that he has a family; the reside at Bloomington.

Ques. 6. How often during the last 3 years have you seen Thomas J. Bunn, and where was he when you saw him?

Ans. I cannot tell you how often I may have seen him, but when I have seen him it was usually at Bloomington, the same as I have seen other persons at Bloomington.

Ques. 7. In whose employ at Bloomington was Thomas J. Bunn during the last 3 years?

Ans. I do not know who employed him, but I have seen him at Hardy's store this winter and last fall. I have also seen him at M'r Eager's store previous; how long that he was at Eager's store I am not able to tell whether it was 1 or 2 years.

84 Ques. 8. In what capacity was Thomas J. Bunn acting while at Eager's & Hardy's?

Ans. As clerk.

Ques. 9. Where was Thomas J. Bunn during the winter of 1855 & '56?

Ans. I don't remember particularly. I am quite certain that I saw him at Bloomington in the fall of 1855. I am not certain about the winter.

Cross-examination:

Ques. 1. Are you acquainted with the circumstances of M'r Bunn as to his property?

Ans. Not particularly.

Ques. 2. State your best knowledge as to his property.

85 Ans. According to my best knowledge he is not a man of much property.

Ques. 3. During your acquaintance with M'r Bunn within the last 2 or 3 years, state whether you know of his doing business on his own

account, or whether he has acted in the capacity of clerk. State all you know upon that subject.

Ans. I don't know that he has been in business for himself for the last 2 or 3 years.

Ques. 4. State what you know of Thomas J. Bunn being employed in business on his own account previous to the time spoken of in your last answer, and of his not being able since that time to pay his debts, and all that you know about there being judgments and executions against him.

Ans. He was in business for himself at Concord, McLean Co.;
86 he was in company with some one else, I believe; as to my knowledge about it, I do not know, but common report was that he failed. I have no knowledge of any judgments or executions against him.

Ques. 5. Have you any knowledge, from report or otherwise, that immediately upon Thomas J. Bunn's procuring his pre-emption claim in question that J. C. Walker sent an execution to De Witt Co. for the purpose of having it levied upon the land in question? State all you know upon the subject, if anything.

(Question objected to by plaintiff. The answer was waived by def'ts' att'y.)

PETER FOLSOM.

JOSEPH P. WINSLOW called and says:

Ques. 1. State your name, age, occupation, and place of residence.
87 Ans. My name is Joseph P. Winslow; age, 38 years; house-carpenter by trade; residence Clinton, De Witt County, Illinois.

Ques. 2. If at any time you were acquainted with Thomas J. Bunn, state where you first knew him, and how long have you been acquainted with him.

Ans. The 29th day of November, 1855, was the first time I ever saw him, and have known him since.

Ques. 3. If at any time you have done carpenter work for Thomas J. Bunn, state when it was and what work you done.

Ans. I commenced on the 29th of November, 1855, to build him a house; the house was 14 by 16 feet, built of plank, with shed roof tongued and grooved, floor stripped all round, with board roof,
88 battened door, with mineral knob, and glass windows, 8 by 10 lights.

Ques. 4. Was there any chimney or flue in said house?

Ans. There was neither chimney or flue of brick, but there was a hole cut through the side of the house, lined with sheet-iron.

Ques. 5. Do you call the building a house or a shanty?

Ans. I should call it a house.

Ques. 6. How long after this house was built was you in the habit of passing & repassing in the neighborhood of where it was built?

Ans. Some six or eight months.

Ques. 7. Can you give the numbers of the land on which said house was bui t, or the location of said house?
89 Ans. I do not know.

Ques. 8. Who pretended to own the land on which said house was built at the time you was building it?

Ans. Mr. Bunn employed me to build the house, and said that he owned the land.

Ques. 9. How long was Thomas J. Bunn in the neighborhood of this house or in the co. of De Witt?

Ans. I cannot tell exactly; as near as I can tell about two weeks at that time.

Ques. 10. Was he there again after this; if yes, how long & where did he stay—reside?

Ans. I do not know.

90 Ques. 11. During the eight months immediately after the building of said house, did Thomas J. Bunn, with his family, reside therein; if yes, how much of that time did he, with his family, reside in the house you built for him?

Ans. I never saw him and his family there but two different times, and that was within one week.

Ques. 12. How long after said house was built was it abandoned by said Bunn & his family?

Ans. I cannot tell exactly.

Ques. 13. At what time did Bunn and his family occupy said house, and how many weeks do you know they were there?

Ans. I do not know that they were there more than 1 week.

91 Ques. 14. Have you passed said house frequently since said 8 months? If yes, have you seen said Bunn and his family in said house?

Ans. I have passed the house 3 times since the 8 months spoken of, & did not see Bunn and his family there.

Ques. 15. If Bunn and his family had made said house their permanent residence, after the buiding of the same, would you have known it?

Ans. I think I should.

Ques. 16. What improvements was on the ground when you built said house; when you commenced the same on November 29, 1855?

92 Ans. There was a shanty, consisting of two forks set in the ground; there was a pole resting on the posts or forks, and covered with boards nailed on the pole.

Ques. 17. Did this shanty form a residence for a family?

Ans. I should think not.

Ques. 18. Could any adult person stand up in it?

Ans. I don't know.

Ques. 19. In building that house you built for Bunn, what was done with his shanty?

Ans. We tore it down and put the lumber into the house.

Ques. 20. Did any portion of said shanty, as it was placed on the ground, form any part of any permanent improvement on said land?

Ans. I think not.

93 Cross-examined by def'ts' att'y:

Ques. 1. What time in the year did you build the house spoken of in your direct examination?

Ans. I commenced it on the 29th of November, 1855.

Ques. 2. How long after you commenced the house did you tear down the shanty spoken of?

Ans. About 3 days.

Ques. 3. Was the lumber in that shanty used in building the house, and what kind of lumber was it?

Ans. It was oak lumber and was used in the house.

Ques. 4. Was it suitable lumber to be used in building a house?

Ans. It was.

94 Ques. 5. Explain what you mean in your last answer in your direct examination, when you say that this shanty formed no permanent improvement to said land.

Ans. I meant that it formed no permanent improvement, because it was torn down and put into the house, and not because the lumber was not good.

Ques. 6. Was you in M'r Bunn's house at any time after he moved there with his family? If so, describe as near as you can what furniture he had in the house.

Ans. I was there twice while his family was there. I saw a bedstead, bed and bedding, 3 or 4 chairs, stove, small table, trunk, dishes, & some cooking utensils.

95 Ques. 7. Did you see any axe, fire-wood about the house? If so, state how much.

Ans. I saw an axe and wood-pile, but cannot say how much.

Ques. 8. Was there any contract with you in relation to shingling the house? If so, what was the reason it was not done?

Ans. There was a contract with me to put a shingle-roof on the house.

Ques. 9. What improvements were on the land and about the house which you built for M'r Bunn? State at any time subsequent to the time you built the house in question.

Ans. I think there was about 100 acres broke up and sowed to wheat in 1856. I saw the wheat growing in the spring of 1857.

96 Ques. 10. State what you know of the situation of that tract of land in reference to timber and settlement at the time you built the house.

Ans. I think about three miles from timber, and I should think a mile or two from the nearest house.

Ques. 11. In the fall and winter of 1755–'56, state, to your best knowledge, whether it was a mild or an extremely cold and unpleasant winter.

Ans. To the best of my knowledge it was an extremely cold and unpleasant winter.

Ques. 12. At the time you visited M'r Bunn's house in Dec'r 1855, state, according to your best knowledge and information, whether M'r Thomas J. Bunn was a married or single man.

97 Ans. According to the best of my knowledge and information, he was a married man.

Ques. 13. State what his family consisted of.

Ans. Himself and wife.

Ques. 14. From what you saw when you was there what is your opinion as to the health of his wife?

Ans. I should think that she was not a healthy woman at that time.

Ques. 15. From what you could see from the health of his wife and the distance timber and the neighbors, during the winter season *season* such as December, 1855, and the winter of 1856, would it have been safe to have left a woman there alone in the house you built for 2 or 3 days at a time?

98 Ans. I should not think it would be safe.

Ques. 16. Did you go to Danville with M'r Bunn for the purpose of proving up his claim; and, if so, when, and why did you go at that time?

Ans. I did go to Danville with M'r Bunn for the purpose of proving up his claim. We started on the 11th day of December, 1855. M'r Bunn had the impression that it had to be proved up within 30 days, was the reason why he hurried to go at that time.

Direct examination resumed:

Ques. 1. Have you seen M'r Bunn on his pre-emption claim since your return from Danville with him? If yes, how often?

Ans. I have not seen him on it since.

99 Ques. 2. Whose furniture was it that you saw in Bunn's house?

Ans. I do not know any other owner for it except M'r Bunn.

Ques. 3. Was there ever any fence around the land broken or plowed?

Ans. There was not.

Ques. 4. How long was it after you built said house *was it* that it fell down?

Ans. I don't know anything about it.

Adjourned to the 21st inst. at 9 o'clock.

Met pursuant to adjournment.

Cross examined again by def'ts' at'y:

Ques. 1. Describe the timber of which the house you built for Thomas J. Bunn was composed.

100 Ans. There was two sills 16 feet long, 5 by 6 inches.

Ques. 2. Was the house built in a good substantial manner for the size of it?

Ans. It was built in as substantial a manner as we generally build a plank house, except the roof.

Ques. 3. You say in your former answer that the house was planked and stripped; describe what you mean by the word "stripped."

Ans. What I meant by it was that there was strips of boards nailed on the cracks.

Ques. 4. At the time you last saw Thomas J. Bunn and family living in said house was you there again?

Ans. I cannot tell exactly how long, but should say it was over 3 months.

101 Ques. 5. At the time mentioned in your last answer as being at the house, state whether Thomas J. Bunn was then living there, or was there, or whether his effects or household goods had been removed, and who occupied the house.

Ans. Neither he nor his family was there; the same furniture and household goods were there; there was no one occupying the house.

Ques. 6. Was you there at any time after the time last spoken of? If so, state who occupied the house, if any one, and what business said occupants were engaged in.

Ans. I have been there since, but did not see anybody in the house.

J. P. WINSLOW.

GEORGE D. SMALLWOOD called.

102 Ques. 1. State your name, age, occupation, and place of residence.

Ans. My name is George D. Smallwood; age, 47 years; residence, De Witt Co., Ill's; occupation, farmer; surveyor occasionally.

Ques. 2. Upon what tract of land is Thomas J. Bunn's situated?

Ans. It is situated upon S. W. ¼ of the S. W. ¼ of section 27, town. 19, N. range 3 east.

Ques. 3. How far is that tract of land from the Illinois Central Railroad?

Ans. I think 4½ miles.

Ques. 4. Who owns the land round section 27, town. 19, N. R. 3 E?

Ans. The land joining on the west and east are railroad-lands, and on the north and south is railroad also.

103 Ques 5. How far do you live from the land claimed by Thomas J. Bunn?

Ans. I live 3 miles north, (1) one mile west.

Ques. 6. Did Bunn usually go past your house in going from the timber or from Clinton to the land he claime!?

Ans. Yes, sir; he went by there and stopped at my house a time or two.

Ques. 7. How long was Thomas J. Bunn on this land or in that neighborhood with his family?

Ans. I never saw Thomas J. Bunn's family, that I know of, and I never saw Thomas J. Bunn there on the land but the one time, not to my knowledge; that was previous to any building being there. I do not know how long that he was there; I never saw him there.

104 Ques. 8. If Thomas J. Bunn had commenced residing on said land in Dec'r, 1855, and continued to reside on the same for twelve months thereafter, would you have known it?

Ans. Yes, sir; I think I should.

Ques. 9. From general reputation and facts that you know, how long did Bunn stop or stay in the neighborhood of this land?

(Objected to by def'ts' att'y.)

Ans. From what I could understand at the time, it could not have been more than 2 weeks.

Ques. 10. Were you present at a trial in the circuit court of De Witt County, at its fall term in 1857, between Lewis Bunn and John Spinar, in regard to sowing wheat on this land claimed by Thomas J.

105 Bunn? If yes, what work did Lewis Bunn prove that he had done on said land, & was Lewis Bunn & Thomas J. Bunn both personally present in said court at said time?

(Objected to by def'ts' att'y.)

Ques. 11. Who got the breaking done on said land?

Ans. I don't know that I can answer all of that question. I don't think that I know anything about it myself personally.

Ques. 12. To whom did the men send for their pay for breaking the same?

Ans. I was going to Bloomington; I think it was last winter. My bro. wanted me to call on Lewis Bunn for some money for prairie-breaking; the prairie-breaking was broke on the claim of Thomas J. Bunn.

106 Ques. 13. Who paid for sowing the wheat on the claim of Thomas J. Bunn?

Ans. I cannot answer that, only in the question that is rejected.

Ques. 14. Who did Thomas J. Bunn at Clinton say paid for the wheat and sowing the same on his claim?

Ans. My impression was from the evidence that M'r Lewis Bunn furnished the money to purchase the wheat sown on the premises claimed by Thomas J. Bunn, and also putting in the wheat on said claim.

(The question and answer objected to by def'ts' att'y.)

G. D. SMALLWOOD.

It is admitted that the records in this land-office shows Moore & Mitchell entered the lands claimed by Thomas J. Bunn November 15th, 1855, & that Bunn entered them on the 20th day of February,

107 1856, both entries made with money.

We are of opinion that the contestant in this case has failed to sustain the allegations set forth in his affidavit, and that the pre-emptor is entitled to his land.

JOHN CONNELLY, SEN'R,
Register.

EDWARD CONOVER,
Receiver.

Attached to the foregoing is the following certificate:

GENERAL LAND OFFICE,
March 29th, 1861.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed copies are true and litteral exemplifications from the records & files of this office.

In testimony whereof I have hereunto subscribed my name
108 and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. M. EDMUNDS,
Commissioner of the General Land Office.

Copy of the proceedings certified by register of land office at Springfield.

No. 1.

Thomas J. Bunn, of McLean County, in the State of Illinois, a citizen of the United States, over the age of twenty-one years, states that on the 8th day of November, A. D. 1855, made a commencement and improvement on the S. ½ of the southwest quarter and on the south half of the southeast quarter of section twenty-seven, (27,) township (19) nineteen, range (3) east, in the district of lands subject to sale at Danville, Illinois, containing 160 acres of land. I do hereby declare my intention to claim said tract of land as a pre-emption right under the act
109 of Congress of the 4th of March, A. D. 1841, and any act amendatory thereto.

Given under my hand this 8th day of November, A. D. 1855.

(Signed) THOMAS J. BUNN.

Attest:
E. J. IVES.

No. 2.

I, Thomas J. Bunn, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands and to grant pre-emption rights," approved September 4th, 1841, to the S. ½ of the S. E. ¼ and S. ½ of S.W. ¼ of section number 27 of township number 19 N. of range 3 east, subject to sale at Danville, Ill's, do solemnly swear that I have never had the benefit of any right of pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or
110 Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which I may acquire from the Government of the United States should enure, in whole or in part, to the benefit of any person except myself.

(Signed) THO'S J. BUNN.

I, William E. Russell, of the land-office at Danville, Ill's, do hereby certify that the above affidavit was taken and subscribed before me this 20th day of February, A. D. 1856.

WM E. RUSSELL, *Rec'r.*

G.—No. 3.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Sept. 11th, 1868.

111 REGISTER AND RECEIVER,
Springfield, Ill's:

GENTLEMEN: Under the date of the 22nd ult., the application of C. H. Moore for a rehearing, in the Danville contested case of Thomas J. Bunn vs. C. H. Moore and John P. Mitchell, was submitted to the department proper, and on the 5th inst. the Hon. Acting Secretary of the Interior declined to reopen this case for reasons stated in his letter, a copy of which is herewith enclosed. Now, in order that the decision of the Secretary of the Interior of June 22nd, 1860, awarding the S. ½ SE. ¼, & S. ½ SW. ¼, sec. 27, T. 19, R. 3 E., to Tho's J. Bunn may be carried out, you are requested to call upon C. H. Moore for the return of the patent inadvertently issued to him for the S. W. ¼ sec. 27, and covered by Danville cash patent, entry No. 17864.

You will report your action in this matter in a special letter, referring to this as G by its date.

112 Very respectfully,

JOS. S. WILSON,
Commissioner.

No. 4.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Sept., 1868.

SIR: I have received your letter bearing date the 22nd and 28th ultimo, and accompanying papers, in reference to the contested case of Thomas J. Bunn vs. C. H. Moore & John P. Mitchell.

It appears from the papers that said Bunn claimed a pre-emption right to the S. ½ of S. E. ¼ & S. ½ S. W. ¼ sec. 27, T. 19, R. 3 E., situated in De Witt County, Illinois, and on the 20th Feb'y, 1856, paid therefor to the register at Danville the sum of four hundred dollars on the 15th Nov., 1855. Said Moore had entered S. W. ¼ of said S. W. ¼, and said Mitchell the remainder of the lands covered by the pre-emption claim of said Bunn. Said entries were subject to the outstanding claim of
113 Bunn, and were liable to be cancelled should it's validity be recognized. The local officers decided in his favor, and your office against him. From your decision an appeal was taken to the Secretary of the Interior, but in the mean time Moore secured a patent for the tract which he claimed.

The Secretary on the 22nd day of June, 1860, reversed your decision and affirmed the paramount right of Bunn to the lands covered by his claim, but for some unexplained cause no patent has been issued to him for the lands or any part thereof. It is stated that said Bunn has since transferred his interest in the lands, and Mitchell's title to the whole or a part thereof has been sold under execution.

You inform me that the question of title has been involved in much litigation in the courts of Illinois. Mr. Moore wrote to you on the 4th June, 1867, in regard to a new hearing in the case, and on the
114 6th ult. he made a formal application for it. He transmitted as "additional evidence" a certified copy of a deposition of Bunn and his wife, taken in a suit pending in a court in the State of Illinois, as to the said S. W. ¼ of S. W. ¼, for which patent had been issued to him, that he did not "desire to move further in that."

The case appears to have been originally considered carefully by the department, and upon briefs furnished by each of the parties.

The present application does not come within the rules heretofore observed in granting a rehearing. The evidence of Bunn would be cumulative, as his right has been transferred. I am of opinion that independently of those rules, and even if so long a time had not transpired, it would be improper to disturb the deliberative action of the department upon such a state of facts as the application presents. It is therefore overruled.

115 The original decision should be carried into effect, at least so far as a patent has not been issued. The entry of Mitchell in conflict therewith should, of course, be cancelled.

I am, sir, very respectfully, your ob't serv't,

W. T. OTTO.
Acting Secretary.

HON. JOS. S. WILSON,
Com'r Gen'l Land Office.

U. S. LAND OFFICE AT SPRINGFIELD, ILLINOIS,
October 29th, 1869.

I, William F. Elkin, register of the U. S. land-office at Springfield, Ill's, do hereby certify that the foregoing papers numbered respectively from 1 to 4 inclusive, are true copies of the originals on file and remaining among the records of my office.

Given under my hand this 29th day of October, 1869.

WM F. ELKIN,
Register.

[5 cts U. S. int. rev. stamp cancelled.]

116 To all of which the said Moore, for himself and the said Davis then and there objected, which said objection was overruled by the court, & the defendants then and there excepted, & the complainants then rested.

The defendant Moore then introduced a patent to him from the gen. government for S. W. S. W. 27, 19, 3 E., dated Feb. 1st, 1859, (see agreement, page 74,) & register's certificate of entry as follows, to wit:

UNITED STATES LAND OFFICE, SPRINGFIELD, ILLINOIS,
Register's Office, October 15th, 1856.

I, John Connelly, s'r, register of the land-office at Springfield, Illinois, do hereby certify that on the fifteenth day of November, in the year A. D. 1855, John P. Mitchell purchased of the general government, at the land-office formerly at Danville, now Springfield, Ill's, the southeast q'r of southwest q'r, & east half of southeast quarter, & east half of
117 northeast q'r, & northeast q'r of northeast q'r, & southwest q'r of southeast quarter of section number twenty-seven, in township number nineteen north, of range number three east, of the third principal meridian, containing two hundred & eighty acres and , and that said land at the time of said purchase was within the district of land formerly subject to sale at the land-office at Danville, Ill's, now Springfield, Illinois, and rendered subject to sale by law, all of which appears of record in my office.

Given under my hand the day and year first above written.

JOHN CONNELLY, SEN.,
Register of the United States Land Office at Springfield.

UNITED STATES LAND OFFICE, SPRINGFIELD, ILLINOIS,
Register's Office, October 8, 1856.

I, John Connelly, s'r, register of the land-office at Springfield,
118 Illinois, do hereby certify that on the fifteenth day of November,
in the year A. D. 1855, Clifton H. Moore purchased of the general government, at the land formerly at Danville, Ill's, now at Springfield, Illinois, the west half of the northwest and the west half of the southeast quarter of section number twenty-seven in township number nineteen north, of range number three east, of the third principal meridian, containing one hundred and sixty acres and , and that said land at the time of said purchase was within the district of land formerly subject to sale at the land office at Danville, Ill's, but now Springfield, Ill's, and rendered subject to sale by law, all of which appears of record in my office.

Given under my hand the day and year first above written.

JOHN CONNELLY, SEN.,
Register of the United States Land Office, Springfield, Illinois.

119 Also, a copy of the record in a certain suit in the United States court at Springfield, Illinois. (See agreement, pages 73 & 74.)

Also, the deed to T. R. Butler, and a deed from Butler to Davis, all for the S E. S. W. 27, T. 19, R. 3 E. (See agreement, page 74.)

And then called J. P. MITCHELL, who testified:

I am the J. P. Mitchell who entered the S. ½ S. E. & the S. E. S.W. sec. 27, T. 19, R. 3 E.; entered it in the Danville, Ill., land-office in 1855—about Nov., 1855. The lands were put up at public sale by the land-officers. I bid off the above at a cent or two per acre more than 2.50 per acre, paid my bid & got my certificate of entry. C. H. Moore at the same time and place bid off at the same sale the S.W. of S.W. ¼ of sect. 27, T. 19, R. 3 E., paying a cent or two per acre more than 2.50 per acre for his tract. At the time of the sale at Danville, when
120 Moore & myself came back from Danville to Clinton, Illinois, we then heard from some source that Thomas J. Bunn had claimed or taken a pre emption on a part of the land in sec. 27, 19, 3 E., & we had entered; and in one or two weeks C. H. Moore, John Warner, & myself went out and went all over said section. There was at that time no improvements on any part said land claimed by Bunn. We did find two pieces of old scantlin', three or four feet long, and an old piece of board about 6 or 8 feet long, laying together upon the ground on the S.W. S.W.; they made no show, & could not have been used in any building to be put upon said land. No one then lived on the land or any part of it, or within two miles of it. Saw the land several times in the winter of 1855-'6. No improvements were put upon it until about Dec. 1, 1856, when a small board shanty, about 12 feet square,
121 was put upon the S.W. S.W. Never saw anybody in it. & don't know of my own knowledge who built the shanty. The shanty remained there a year or so, & then disappeared. No other building was ever put up on the land, and it is now raw prairie. Have sent my certificate of entry of this land to the land-office for a patent. They hold my certificate yet, but I have never taken back my purchase-money for this land. I never knew of Thomas J. Bunn living on this land. He could not have lived there long without my knowing it. I am the defendant in the record introduced here from the U. S. court at Springfield, Illinois. Then I paid all the taxes on this tract until sold by T. R. Butler.

C. H. MOORE called and sworn.

I entered the S.W. S.W. 27, 19, 3, at a public sale of lands made by the land officers in Danville about Nov. 15th, 1855. It was put
122 up at auction. I bid one or two cents per acre over 2.50 per acre. It was struck off to me, & I paid for it in money & land warrants, or all money. Mitchell, either just before or just afterwards, bid off the S.E. S.W. at about the same price. I was close to him when he made the bid. Had no notice of any pre-emption claim then upon the land; did not hear of any such claim until we came back to Clinton. Did then hear from some source, not now remembered, that some person in Bloomington, Ill's, had or intended to pre-empt a part of 27, T. 19, R. 3, and in from ten to twenty days after we entered the land at Danville, John P. Mitchell, John Warner, & myself went out & examined the land carefully, particularly S. ½ S.E. & S. ½ S.W. ¼ 27, 19, 3. We were at the N.W., S.W., & S.E. corners of that section. There was no
123 improvements or timber or materials for improvements on this 160 claimed by Bunn, except the three little pieces of lumber named by Mitchell. The next fall or winter after I had entered the S.W. S.W. there was a little shanty on the land. Never saw Bunn or any other person living in it. This shanty remained there a year or two, & then it disappeared. After I had entered the land it was assessed to me, and I have paid all taxes assessed upon it since. Think it was sold for taxes once, but I bid it off & paid it in that way.

GEORGE D. SMALLWOOD called & sworn.

Am a surveyor; live in sec. 16, T. 19, R. 3, about 3 miles from this land, in 1855; was about the nearest resident to it in 1855. There was no one living on this land in 1855, to my knowledge. In the fall or winter of 1856—think it was in the fall of '56 that I saw a little shanty
124 had been erected on it; never saw anybody living in it; know Thomas J. Bunn, of Bloomington; he was at my house once or twice in 1855 or '56; he could not have lived there long in either '55 or '56 without my knowing it.

The deposition of Thomas J. Bunn & wife was then read by defendant Moore, as follows:

Deposition of Mary E. Bunn, taken May 3d, 1867.

Int. 1. What is your name, age, and residence?

A. Mary E. Bunn, wife of Thomas J. Bunn; age 30 years; residence Bloomington, Illinois.

Int. 2. Do you know the parties to this suit; if so, which ones, and how long have you known them?

A. I do not know any of the parties except my husband; have seen Mr. C. H. Moore.

125 Int. 3. If at any time you lived in De Witt County, state when it was & how long you lived in the county.

A. We did live in De Witt County. It was nearly twelve years ago this spring, and it was the next summer or fall that we lived in De Witt County. I think it was in Sept., but am not positive; it was just cold enough to have a fire. I think we staid there a week, as well as I remember.

Int. 4. In what house did you live during this time?

It was in a shanty of one room, on some land that my husband had pre-empted; do not know the numbers of the land.

Int. 5. How many nights did you remain at this house, & how many did you stay at Smallwood's?

126 A. Did not stay at Smallwood's at all. The night we went down we stayed at Winslow's, as well as I remember. We stayed all the other nights in this shanty.

Int. 6. How long were you gone from Bloomington, & what proportion of your household & kitchen furniture did you take down to this house with you?

A. We were gone eight or nine days, I should think; am not positive as to number of days. We took down a bed & bedding, stove & kitchen furniture, two chairs, a table, & dishes. We were boarding at the time we went down, & so had no household & kitchen furniture except what we purchased to take down.

Int. 7. When you went down did you expect to remain any length of time?

127 A. I did not know how long we were to remain; there was no time set when we were to come back.

MARY E. BUNN.

Deposition of Thomas J. Bunn, taken May 3d, 1867.

Int. 1. What is your name, age, residence, and occupation?

A. Thomas J. Bunn; age, thirty-four years; residence, Bloomington, Illinois; am postmaster.

Int. 2. Do you know the parties to this suit; if so, which one, and how long have you known them?

A. I am one of the defendants; have known Mr. Robbins about six or seven years, & Mr. Moore 20 or 30 years.

128 Int. 3. If you have ever lived in De Witt County, state how long & on what land you resided.

A. I lived in De Witt County about twelve years ago. I think it was on sec. 27, town. 19, range 3. I think we went out there from Winslow's Monday afternoon, and came back the next Monday afternoon. Our household stuff that we took down there we did not get back under about a month.

Int. 4. Did you reside there as long as you intended when you left Bloomington?

A. No; I think my wife was sick. That was the reason we came off when we did.

Int. 5. When you left Bloomington did you intend to make this land your permanent home?

129 A. It was not the intention to remain there permanently that fall or spring that we went there, because we did not have suitable accommodations. After that it depended entirely upon circumstances. My present impression is that I would not reside there permanently for four or five such pieces of land.

Int. 6. Did you ever make any effort to go back and live on the land?

A. No; not to go back and live on it. We attempted to cultivate it two years, or to have it cultivated. We did not cultivate it personally.

Int. 7. Did you ever gather a crop from it or have it done?

A. I think a part of a wheat crop that was grown on it one year was gathered by Mr. Spencer.

Int. 8. Can you give the date of your residence there?

130 A. My impression is it was in September, & in this I am a good deal guided by what my wife says. I am not sure whether it was in 1854 or '5. I should think 1855.

Int. 9. Was it the year after you filed your pre-emption claim?

A. If I filed the pre-emption claim in the winter, which is my impression, then it was the next fall that I went there.

THOMAS J. BUNN.

This is all the evidence given in said cause.

JOHN M. SCOTT, [SEAL.]
Judge.

Copy of agreement.

In circuit court of De Witt County, Ill.

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN ET AL.

131 Abstract of the record from Springfield, to be incorporated into the certificate of evidence instead of the record itself, as follows:

A record duly certified, from the United States circuit court for the southern district of Illinois, showing that on the 11th day of June, A. D. 1859, Horatio M. Avery, Theron R. Butler, and John R. Cecil, partners doing business under the name, firm, & style of Avery, Butler & Cecil, recovered a judgment in said court against John P. Mitchell & Joel King, partners, doing business under the name and style of Mitchell & King, for the sum of $2,030.09; and that afterwards, to wit, on the 22nd day of July, 1859, an execution was issued on said judgment, but not taken from the clerk's office; and that afterwards, to wit, on the 13th day of January, 1860, an alias execution issued out of said court on said judgment and came into the hands of the marshal on the same
132 day. On the 27th day of January, A. D. 1860, was levied, among other lands, on the E. ½ W. ½ sec. 27, town. 19 N., R. 3 E., 3d P. M., and after being advertised, was sold by the marshal on the 29th day of March, 1860, to C. H. Moore, pl'ff's att'y, and a certificate of purchase was issued by the marshal to him, which was afterwards assigned by him to Theron R. Butler, one of the plaintiffs, (all the other lands sold having been redeemed;) and afterwards, on his petition, the said court, on the 6th day of May, 1865, ordered D. L. Phillips, the then marshal, to make a deed to said land on said sale to said Butler.

Deed from D. L. Phillips, marshal, to Theron R. Butler to said land, dated January 6th, 1865, for E. ½ S. W. & E. ½ N.W., 27, T. 19, R. 3 E., and recorded in book U of deeds, page 450, January 31st, 1865.

Quit-claim deed from Theron R. Butler to David Davis for said
133 land, dated January 9th, 1867, and recorded in book X of deeds, page 477, March 29th, 1867, for the E. ½ S. W. & E. ½ N. W. ¼, 27, T. 19, R. 3 E.

Patent from the United States to Clifton H. Moore for W. ½ S. W., 27, T. 19, R. 3 E., dated February 1st, 1859.

By agreement, both parties have the right to appeal, without bond, and may use the same record, and the above synopsis is to be inserted in the record instead of the record from the United States and the patent to Moore and the marshal's deed to Butler and Butler's deed to Davis.

WILLIAMS & BURR,
For Robbins.
DAVID DAVIS,
By C. H. MOORE,
His Solicitor, &
C. H. MOORE, *pro se.*

I hereby certify that the above abstract is to be inserted into
134 the record in place of the record, deeds, & patent above named, after the descriptions of the lands & dates are fil'ed in.

Dated this 20th day of December, A. D. 1869.
[SEAL.] JOHN M. SCOTT, *Judge.*

STATE OF ILLINOIS,
De Witt County, ss:

I, W. L. Chambers, clerk of the circuit court within and for the county of De Witt, in the State aforesaid, do hereby certify that the above and foregoing is a complete copy of the records and files pertaining to a certain cause lately pending in said court, on the chancery side thereof, wherein Rufus W. Robbins was complainant and Thomas J. Bunn et al. were defendants, as appears to me from the records and files of my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Clinton, this 29th day of December, A. D. 1869.

WM. L. CHAMBERS, *Clerk,*
By W. H. HARRISON, *Deputy.*

135 State of Illinois, supreme court, 2nd grand division. January term, 1870.

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, and David Davis. } Appeal from DeWitt.

Assignment of errors.

Appellant assigns the following errors on this record:

The court erred to the prejudice of appellant—

First. In dismissing the bill as to the land patented to Moore.

Second. In not decreeing that Moore convey to Bunn the legal title vested in him, Moore, by the patent.

Third. In not decreeing the land patented to Moore to be subject to the mortgage.

Fourth. In not setting aside the deed from the marshal to Butler and from Butler to Davis.

136 For the above errors and others that will be apparent on an inspection of the record, the decree should be reversed and modified or the cause remanded, with instructions to the court below.

WILLIAMS & BURR,
Counsel for Appellant.

The decree should not be reversed on account of any of the above errors.

C. H. MOORE.

Appellees come and assign the following cross-errors on this record:

1. The court erred to the injury of appellee, Davis, in ordering that the land conveyed to Davis was subject to the mortgage.

2. In setting aside the deeds made by the marshal to Butler & by Butler to Davis.

137 3. In setting aside Mitchell's entry of the land at the land office at Danville, Illinois.

4. In deciding that Bunn's pre-emption was the superior title.

5. In deciding that Robbins had any right to contest any title to the land in said mortgage mentioned.

6. In not dismissing complainant's bill as to respondents, Davis & Moore.

C. H. MOORE,
For David Davis & Himself.

The decree should not be reversed by reason of any of the above assigned errors, but should be reversed for the errors assigned by Robbins.

WILLIAMS & BURR,
For Robbins.

138 Be it remembered that on this day, being the 22nd day of January, A. D. 1875, and the 15th day of said January term, the following order was made in the words and figures, to wit:

DAVID DAVIS ET AL. }
v. } 206. Appeal from De Witt.
RUFUS W. ROBBINS. }

On this day come again said parties, and it being regular call-day of the docket, and the number of the cause being reached, it is ordered by the court that this cause be taken on call for final hearing on abstracts and briefs being filed.

139 Be it remembered that on this day, being the 16th day of June, A. D. 1875, and in vacation of said January term, 1875, the following opinion of the court was filed in the cause, and in the words following, to wit:

DAVID DAVIS ET AL. }
v. } 206. Appeal from DeWitt.
RUFUS W. ROBBINS. }

Opinion of the court by Mr Justice Breese:

This is an appeal from the decree of the circuit court of De Witt County, rendered in conformity to the judgment of this court in the case of Robbins vs. Bunn et al., decided at January term, 1870, and report in 54 Ill., 48.

No new facts or arguments have been urged upon our attention requiring us to review that decision; it is therefore adhered to, and the decree of the circuit court is in all things affirmed.

Decree affirmed.

The following is the judgment of court as entered upon the day and year last aforesaid in the words & figures, to wit:

140 STATE OF ILLINOIS,
Supreme Court, Central Grand Division, ss:

At a supreme court begun and held at Springfield, on Tuesday, the 5th day of January, in the year of our Lord one thousand eight hundred and seventy-five, to wit, on the 3d day of February, in the year of our Lord one thousand eight hundred and seventy-five:

Present: Pinkney H. Walker, chief justice; Sidney Breese, justice;

William K. McAllister, justice; John Scholfield, justice; John M. Scott, justice; Benjamin R. Sheldon, justice; Alfred M. Craig, justice.

DAVID DAVIS AND CLIFTON H. MOORE
vs.
RUFUS W. ROBBINS.
} Appeal from De Witt.

(Entered in vacation of Jan. term, 1875, on the 16th day of June, 1875.)

On this day come again the said parties, and the court having diligently examined and inspected as well the records and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the decree aforesaid, is there anything erroneous, vicious, or defective, and that that record is no error:

Therefore, it is considered by the court that the decree aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said appellee recover of and from the said appellants costs by him in this behalf expended, and that he have execution therefor.

I, E. C. Hamburgher, clerk of the said supreme court, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above-entitled cause of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court at Springfield, this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-five.

[L. S.] E. C. HAMBURGHER,
Clerk Supreme Court.

141 Be it remembered that on this day, being the 25th day of June, A. D. 1875, there was filed in the office of the clerk of the supreme court of the State of Illinois for the central grand division, the following writ of error, appeal-bond, and citation, in the words and figures, to wit:

142 STATE OF ILLINOIS,
Supreme Court, Central Grand Division:

DAVID DAVIS & CLIFTON H. MOORE, PLAINTIFFS IN ERROR,
vs.
RUFUS W. ROBBINS, DEF'T IN ERROR.

Heard at the January term, 1875.

I, John M. Scott, chief justice of the supreme court in and for the State of Illinois, on the request of the plaintiffs in error, do allow, permit, and request that a writ of error be issued by the clerk of the circuit court of the United States for the southern district of Illinois, at Springfield, Illinois, in the usual form in such cases made and provided.

And I further certify that I have signed the usual citation in such cases, approved their bond in the sum of $1,500.00, and that the questions in said record involve the construction of the acts of Congress in regard to the entry and pre-emption of the public lands, and that the

decision of the supreme court of Illinois is adverse to a right claimed under said acts of Congress.

Bloomington, Ill's, June 23, 1875.

JOHN M. SCOTT,
Chief Justice of Supreme Court of Ill's.

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between David Davis and Clifton H. Moore, plaintiffs in error, and Rufus W. Robbins, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest er-

114 ror hath happened, to the great damage of the said David Davis and Clifton H. Moore, plaintiffs in error, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-third of June, in the year of our *year* Lord one thousand eight hundred and seventy-five.

[SEAL.] JOHN A. JONES,
Clerk of the Circuit Court of the U. S. for Southern District of Illinois.

STATE OF ILLINOIS,
County of Sangamon, ss:

115 C. H. Moore, being duly sworn, says that he has duly served this writ by delivering the same to E. C. Hamburgher, clerk of the supreme court of the State of Illinois, central grand division, at Springfield, Illinois, with a copy thereof left and lodged with the same clerk for the use of the opposite party, on this day of June, 1875.

Sworn to and subscribed before me this 26 day of June, A. D 1875.

[SEAL.] E. C. HAMBURGHER,
Clerk of the Supreme Court of Illinois, Central Grand Division, with seal attached.

STATE OF ILLINOIS,
Central Grand Division:

I, E. C. Hamburgher, clerk of said court, have executed this writ by making out and delivering to one of the plaintiffs in error, Clifton H. Moore, a certified copy of the record & opinion of this court in said cause, with a copy of the bond filed in this office, and by delivering to him the original writ of error & citation, with the returns thereon & the order of Judge John M. Scott, chief justice of said court, all to be by him transmitted to the Supreme Court of the United States at Washington City, D. C., before the return-day named in this writ.

[SEAL.] E. C. HAMBURGHER,
C. S. C.

146 Supreme court, central grand division.

DAVID DAVIS AND CLIFTON H. MOORE, plaintiffs in error,
vs.
RUFUS W. ROBBINS, DEFENDANT IN ERROR. } In error.

Know all men by these presents that we, Clifton H. Moore and David Davis, as principals, and John Warner, as surety, are held and firmly bound unto the above-named Rufus W. Robbins in the sum of fifteen hundred dollars lawful money of the United States to be paid to the said Rufus W. Robbins, his executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 23rd day of June, A. D. 1875.

Whereas the above-named Davis and Moore have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Davis and Moore shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make good
147 their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) CLIFTON H. MOORE. [SEAL.]
DAVID DAVIS. [SEAL.]
JOHN WARNER. [L. S.]

Approved by the undersigned.
JOHN M. SCOTT,
Chief Justice Sup. Court of Illinois.

(Indorsed:) Filed June 25, '75. E. C. Hamburgher, C. S. C.

148 UNITED STATES OF AMERICA, *ss:*

To Rufus W. Robbins, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein David Davis

and Clifton H. Moore are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable John M. Scott, chief justice of the supreme court of the State of Illinois, this 23rd day of June, A. D. eighteen hundred and seventy five, and of the Independence of the United States the ninety ninth year.

JOHN M. SCOTT,
Ch. Justice Sup. Court of Ills.

UNITED STATES OF AMERICA,
State of Illinois, ss:

C. H. Moore being duly sworn, says that he has served this writ by reading the same writ of citation to Williams & Burr, on the 30th day of August, A. D. 1875, & by delivering to *to* Robt L. Williams and Hudson Burr, who are & were counsellors of the defendant in error, Rufus W. Robbins, herein, a true copy of the same, & informing them of its contents and effects, and requesting them deliver it to the defendant in error, their client.

C. H. MOORE.

Sworn to & subscribed before me this 16 day of September, A. D. 1875.

In witness whereof I hereunto set my hand & official seal this 16 day of September, A. D. 1875.

GEORGE B. GRAHAM,
Notary Public of De Witt Co., Ills.

I, T. C. Hamilton, clerk of the supreme court for the central grand division of the State of Illinois, do hereby certify that the foregoing is a correct, true, and complete copy of all the proceedings had in said cause, together with the writ of error from the Supreme Court of the U. S., and the bond and citation.

In witness whereof I hereunto set my hand and the seal of said supreme court, at Springfield, this 25th day of June, A. D. 1875.

T. C. HAMILTON, C. S. C.
[SEAL.]

(Indorsement on cover:) No. 255. Clifton H. Moore et al., plaintiffs in error, *vs.* Rufus W. Robbins. Illinois supreme court. Filed 18th October, 1875.

No. 256.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

UNITED STATES

Supreme Court

WASHINGTON CITY, D. C.

CLIFTON H. MOORE et al.,

Appellants.

vs.

RUFUS W. ROBBINS,

Appellee.

BRIEF OF APPELLANTS.

C. H. MOORE, Pro. Se.

CLINTON, ILL.:
RICHARD BUTLER, PUBLIC PRINTER.
1878.

Supreme Court of the United States.

WASHINGTON CITY, D. C.

CLIFTON H. MOORE *et al*
vs.
RUFUS W. ROBBINS.

In Error to the Supreme Court of the State of Illinois.

This case arises upon the part of Plaintiff Moore upon this state of facts:

On the 15th day of November, 1855, Moore, at a public sale of lands belonging to the United States, made by the land officers (Register and Receiver) at Danville, Illinois, purchased for coin amongst other tracts, the south-west south-west quarter of Section 27, Town 19, Range 3, East of the 3d P. M., situated in DeWitt county, Illinois, and paid therefor at such sale a few cents per acre over $2.50 per acre for said land; received the Receiver's receipt for the money, which he afterwards sent to the General Land Office at Washington City, and received his patent therefor, and from the time of such entry up to the decision of this suit in Court below had paid all the taxes on this land.

Rec. 116, 118, 122, Trans, 35 & 36, 34.

The title to the south-east south-west of same section, claimed by Appellant Davis arises in this way: John P Mitchell, on November 15, 1855, at a public sale of government land made by the Register and Receiver of the United States land office at Danville, Illinois, bid off the south-east south-west quarter of Section 27, Town 19, Range 3, East, for a few cents per acre more than $2 50 per acre, paying coin therefor and received his Receiver's receipt therefor. Mitchell or his grantees paid all the taxes on this forty from the time it was entered up to the decision in the Court below. (Rec. 117, 119, 120, 121, Trans. 34 and 35.) Mitchell's title to the forty was afterward sold on a judgment in the United States Court at Springfield, Ill., to Theron R. Butler, and not being redeemed according to law a deed was made by the marshal to Butler who afterwards conveys the same to David

Davis, and Butler and Davis paid all the taxes assessed upon this forty afterwards.

Robbins, the appellee, obtains his title in this manner: Thomas J. Bunn pretends to pre-empt these two tracts and other lands (south half south-east 27, 19, 3, east,) and enter the same February 20, 1846, at the land office at Danville, Illinois, and on the 22d day of February, 1855, mortgages it to Lewis Bunn for $1000. Years afterward Lewis Bunn sells and assigns this note to Rufus W. Robbins, who some time afterwards commenced this suit to foreclose his mortgage, making Bunn and wife and Davis and Moore parties thereto.

Rec. 24, 32, 74, 75, Trans 9, 11, 23, 24.

Our first error in short is, that the Court below erred in holding that the purchase by Mitchell of the south-east south-west, for coin at a public sale of lands made at Danville, without the knowledge of Bunn, pre-emption was a fraud upon Robbins. (Sec. 10 of act of Congress Sept. 4, '41, Lester's Land Laws p. 61.) Notice must be filed before sale. (Sec. 14 of same act, Lester's Land Laws, vol. 1, p 362 and 382, and letter 421.) Bunn had no notice on file the day of the sale, and he has failed to show that he resided on the land. His own testimony shows he never intended to reside on it and make it his home.

Mitchell says in his evidence that when he bid off the land at the sale he had no notice of Bunn's claim, and there was nothing on the land to notify him. (T. p. 35, Rec. 119 to 121.) Nor was there any papers filed in the land-office signed by Bunn. Nor was the land office plats marked as directed by the regulations of the General Land Office, (Lester's Land Laws, p. 362,) filed and entered in a book and plat mark, with cross in red ink on tract claimed.

If Bunn had his declaratory statement filed in the land office at Danville in time so that either the land officers or Mitchell knew of it, it is but fair to presume that the Register and Receiver would not have offered it for sale, nor even would Mitchell have purchased it. Officers are presumed to do their duty—to comply with the laws and regulations made to control them. And before a public sale of this kind should be set aside, and officers making it declared to have made it illegally and fraudulently, it must be proven that this declaratory statement was on the files of the land office in the custody of the proper officer; that he or they knew the contents of the paper, and

yet in disregard of it sold the land to Mitchell, and that Mitchell knew or could have known by examining the records of pre-empted lands, or the land itself that Bunn had a pre-emption, or at least had filed his declaratory statement claiming the land. Mitchell and the land officers are both presumed to know the law. Mitchell could find no pre-emption claim; the officers found none and put up the land at public sale and Mitchell bid it off. Mitchell says he never heard of any pre-emption until he came back to Clinton. The land officers in putting it up for sale said to all that there was no such claim as Bunn's on the land.

If this conduct of the land officers and Mitchell is to be called fraudulent or found to be fraudulent by this Court, it should be upon positive proof by Bunn or his assignee that Bunn's declaratory statement was on file and in the custody of one of the officers making the sale, and that he had at the time of filing the same commenced his improvements on the land pre-empted, and continued there and made his home in such a manner as to show any one that his claim was made in good faith. In this we think Robbins entirely failed. Failed first in not showing by the officers or the file mark on the paper, in which he declared his intention, that it was in the custody of the proper officials the day before the sale, and thus show that they were guilty of a fraud upon Bunn's rights by offering the land at public sale; and that Mitchell was equally guilty, and had either actual or constructive notice of Bunn's pre-emption, and that it was made in good faith. Was there any proof of when this declaratory statement was filed in the land office at Danville? Not one witness proves it; not one word on it shows that it was ever filed; no copy of the book in which entries of this kind were made was produced.

There is a copy of a declaratory statement signed by Bunn and dated November 8, 1855, and witnessed by E. J. Ives, who is not a Register or Receiver of the land office, copied in the record 168, but no person says when it was filed or even filed. This copy is certified to, not by land officers at Danville, Ill., but by those at Springfield, Illinois. If there had been a file mark on it that would have been certified, also if no file mark; and if it was actually in the land office at Danville, Illinois, at the time the officers made this sale Robbins or Bunn would have proven it by the land officer or officers whose duty it was to receive and file it, record it in a book, mark the tract and not

offer to sell it, or by Bunn or the messenger by whom he sent it. Nothing of this kind was done, or it would have been proven. It was not proven because it was not filed; and if not filed then the land officers at Danville had a right to sell the land; and if they had a right to sell Mitchell had a right to buy. Declaratory statement must be on file in the proper office before the sale. Bunn did not show that he had complied with Section 15 of Act of September 14, 1841. His improvements must be commenced and his notice filed before the day of sale; and if the land is entered the same day that improvement is commenced, the entry is valid and the pre-emption bad. (Lester's Land Laws, vol. 1, p 361–2. Secretary Ewing's decision, same book, p. 382, No. 421, as to meaning of words, settle, inhabit and improve. Lester's Land Laws, vol. 1, p. 381, 414 and 413, and letters 480 and 481.)

Bunn never made proof by any witness but himself as to settlement, residence and improvements. This he must do by other witnesses, and there must be duplicate affidavits. Witnesses in the plural must be shown their statements reduced to writing, (Lester's Land Laws 360 to 366,) one copy retained, the other sent to Washington. Neither copy of this proof has been introduced. If it was made the proof would have been presented; and if presented it would have been produced on the hearing of this case. But the only papers in proof which were shown to have been in the land office at Danville, were Bunn's own affidavit, dated February 20, 1855, and his receipt for the money of the same date. He must do something more than this to preserve his pre-emption rights. He must comply with the law.

Again: If Bunn's declaratory statement was on file he had no valid pre-emption. He made no improvement on the land of any kind until the fall after he made his claim. He really lived in Bloomington, McLean county, Ill., all the time. (Bunn's deposition, p. 130 of Record, Trans. 38. Mrs. Bunn's deposition, Record 125, Trans. 36,) only staid a week. Smallwood says the house was put on the land in fall of 1856. (Record 123–4, Trans. 36.) Mitchell says there was no improvement on the land when he saw it one or two weeks after he came back from Danville after he had entered it. Shanty was put up about December 1, 1856. (Record 119, 120, 121, Trans. 35.) Moore says there were no improvements on the land in ten or twenty days after it was entered by Mitchell; next fall after the entry the shanty was put up. (Record 122, Trans. 36.)

Mitchell, Warner and Moore saw it at same time, and in addition to this Fulsom says Bunn resided in McLean county, Ill.,—Bloomington—all the time for last ten years; may have been absent two or three months at a time during that time, (Record 82 and 83,) and Bunn and wife both say that they were only gone from Bloomington about a week or eight days [Record 125 and 128,] in September after he filed his pre-emption.

To rebut the statements of these six witnesses, Winslow is brought on the stand, and he does say that he commenced building this house November 29, 1855, [Record 87, Trans. 27,] in which he was, as the evidence all shows clearly, mistaken about one year But let us take even Winslow's statement for true, and he shows that no improvements were put on the land until November 29, 1855. Winslow does not make that evidence to the land officers, but makes it at Springfield some time afterwards. Let Bunn's pre-emption be ever so just he failed to put in his notice and proof in the time and manner prescribed by law and the regulations of the General Land Office. Mitchell and Moore had entered it just fourteen days before that time. Bunn fails to show that on the 15th day of November, 1855, when it was put up and sold that he had anything on the land in the shape of improvements; never resided on it, making it his home; abandoned it; never paying any taxes on it from the commencement of his title to the decision of this cause in the Court below. Neither Bunn nor Robbins has ever paid any taxes on these tracts What stronger evidence of abandonment of real estate can there be than going away from it after a residence on it for one week, and never paying any taxes upon it from 1855 to 1874. Bunn and Robbins knew that the land had all been entered by Mitchell and Moore. No effort is made to reside on it but the one week, and no effort to pay taxes. Mitchell and Moore paid the taxes in good faith, supposing the land was abandoned to them.

How could this purchasing of land by Mitchell and Moore have been a fraud on Robbins? He knew or ought to have known just what the records of the land office at Danville did show; knew that no notice was filed when the sale was made; knew that there was no part of an improvement on the land when it was sold; knew that Bunn had never complied with the law in improving, residing and settling upon his claim or in proving the same by other witnesses; knew that Mitchell and Moore at a public sale of this land made by the

proper officers at the proper place bought these tracts, paying more for them than Mr. Bunn wanted to pay. Robbins bought this note and mortgage long after it was due, and has no better rights than Bunn.

Cramer vs. Willette, 61 Ill., 481.
Haskell vs. Brown, 65 Ill., 29.

Officers are presumed to do their duty as laid down by the law and instructions from the general land office, and the fact that they decided to offer this land for sale is good proof that they decided at that time that Bunn had no pre-emption. (Sec. 14, act Sept. 4, 1841.) This land is about four miles from the Illinois Central Railroad limits, consequently governed by the Statute of August 2, 1852, Lester's Land Law, 188, and March 5, 1853, and complainant must show Bunn's settlement was made before the final allotment of the land is made. Bunn had this much more to do than under the law of September 4, 1841. (Lester's Land Laws, vol. 1, 204; Circular 408; L. L. Laws, vol. 1, 361, third qualifications for claimants.) Failing in this he has no claim.

Our second error, in addition to what we have said, we will only say that Bunn's claim of pre-emption lacked the three essentials to make it valid:

1. Notice filed in the land office with the proper officer before the sale to Mitchell and Moore. [Section 14 and 15, act of '41, Lester's Land Laws, p. 382, No. 421, Second Division.]

2. He did not commence his improvements or any improvements on said land before it was sold by the land officers at a public sale according to law. [Lester's Land Laws, vol. 1, p. 383, No. 409, p. 409, No. 463.

3. Bunn did not perfect his pre-emption by settling upon, inhabiting and improving his land. [Lester's Land Laws vol. 1, p. 312, No. 468. Absence not accounted for.]

4. Did not have the testimony of other witnesses in duplicate and in writing before the land officers at Danville, before or at the time he paid for the land. His haste to pay for the land on the 20th of February, 1855, when he had a whole year to do it, from November 29, 1855, without interest, is a badge of fraud on his part. Western men are not so anxious to pay to the government the amount due it from them. Bunn is no exception to this rule, and the mortgage that

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he put on it only two days afterward may explain it. He was but a tool in Lewis Bunn's hands. [See Sec. 15 of Act September 4, 1841, Lester's Land Laws 360 to 366; Act of Congress August 2, 1852, Lester's Land Laws p. 188–9, No. 205.] This land was within the limits of the land granted to the Illinois Central R. R. Co. [Rec. 102, Trans. 30.]

It was ten months from the time Bunn says he filed his claim, early in the winter of 1855, until he moved on this land. Settled on land next fall. All the intervening time he was living in Bloomington, only thirty miles away, and to which city he returned just as soon as he had lived in the house one week. Won't say he even intended to stay on the land.

There is no proof that Bunn ever proved his pre-emption at Danville by any witnesses but himself. Bunn makes an affidavit February 20, 1856, [Rec. 75–6, T. 24,] before W. E. Russell, Receiver, and paid for the land the same day. [Rec. 74, T. 23.] Nothing else was done; no other proof. Winslow was not there. He says he went December 11, 1855. [Rec. 98, T. 29.] Nothing was done on that day; no proof taken; no money paid.

The third and fourth errors assigned are the same as the first and second, only they apply to Moore's title. And all that we have said as to the first and second error will apply to them with equal force.

To the fifth error we say, that Moore's title (patent) issued by the proper officer, in the proper form, and for a valid consideration, and Davis's title, acquired through Mitchell, without notice, can not be fraudulent, in our estimation. Fraud implies wrongful acts with evil intent, knowingly done. Wherein have Mitchell, Davis or Moore been guilty of fraud in this transaction? Fraud must be proven by acts done by the parties. Affirmative facts must be shown to this Court. Mitchell and Moore were at the land office at Danville, Ill., November 15, 1855, to attend a public sale of land made by the land officers of that place, according to law. Can it be said this act was fraudulent? No declaratory statement was filed in the land office; nor were said tracts offered marked with red ink, to indicate such claim; nor was there any improvement or settlement on said land to indicate Bunn's claim; no actual or constructive notice to either sellers or buyers of Bunn's claim. The proper officers of the United States, at the proper time and place, offered this land for sale. This they would not and should

not have done had Bunn filed with them his notice in time. The law says it must be done the day before the sale. Nor would Mitchell and Moore have bid it off at such sale, pay the Government in coin for it, and pay more than Bunn paid for it. Neither buyers nor sellers had heard of Bunn's claim. Was there anything wrong or fraudulent in their doing this? There is no pretence in the proof that Bunn's claim was on file. If it was on file the officers knew it. They sold the land; and if it was a fraud on their part the United States was bound by the sale and parted with its title November 15, 1855, and the officers could not sell it again to Bunn.

Aldrich vs. Aldrich, 37 Ill., 32.
Beatty vs. Sale, 43 Ill., 351.

It was Bunn's failure to comply with the laws and instructions that lost to him the land. At no time was he a bona fide pre-emptor, nor did he even intend to be an actual settler on the land, making it his permanent residence. A United States patent can not be set aside without clear evidence of fraud. No government officer can do it. It is the act of the highest officer in the government—the conclusion of all their acts and decisions in regard to the matter in controversy. The fraud, we say, was all upon Bunn's side. He was a merchant in an adjoining county trying to get a tract of land at less than its market price by living upon it one week. Says himself that he would not stay on it for four or five such tracts; did not intend to live there permanently the fall or spring he went on there. (Rec. 121, T. 37.) Trying really to get the land in fraud of law. Equity will not raise a trust in such cases.

Leggett vs. Duboice, 5 Paige, ch. 114.
Brown vs. Welch, 18 Ill., 346.
Lee vs. Summers, 2 Oregon, 260.
Quin vs. Kenyon, 38 Cal., 499.

Patent not cancelled only upon the fullest evidence of fraud.

Patterson vs. Jenks, 2 Peters, 216.
Stuges, lessee, vs. Young, 3 Peters, 320.

Only equities can be tried against a patent.

Bagnell vs. Brodnick, 13 Peters, 436.

If Moore has the prior patent Bunn must show prior valid entry.

Hunt vs. Wickliffe, 2 Pet., 201.

Winter vs. Cromlin, 18 How. U. S., p. 73, and cases cited.
Hoofnagle vs. Anderson, 7 Wheat., 212.
Taylor vs. Brown, 5 Cranch, 234.
Finly vs. Williams, 9 Cranch, 164.

Neither Moore nor Mitchell made any representations, nor have they done acts that were fraudulent. We hardly think the same can be said of Bunn. Nor have the land officers at Danville, Ill., ever decided this case against them. If the Register and Receiver of the land office at Danville have done any thing they have decided to offer the land for sale; sell it to Mitchell and Moore; take their money for it, and then let Bunn enter it without proof excepting the one affidavit, February 20, 1856.

Upon the sixth error we say, that Robbins, by filing his bill to foreclose his mortgage, and making Mitchell, Davis and Moore parties, put in issue Bunn's pre-emption entry and Bunn's right to mortgage the land to Lewis Bunn only two days after he had entered it; and unless he shows a clear right in himself, by showing that Bunn had a clear right to do all he did, that he did it in apt time and according to law, he has not the clean hands necessary in a court of equity before he can attack a title honestly obtained without notice, presumptive or actual. The burden of proof is upon the person attacking his adversary's title. A Patent is the conclusion of all the land-officers, and to defeat it a better title, and earlier in its inception, must be shown, and it must be one not tainted with fraud.

Parkinson vs Bracklin, Burnell's Wis., R. 13.
Lamont vs. Stemson, 3 Wis., 545.
Hess vs. Bolinger, 48 Cal., 349.
Dunn et. al. vs. Schneider and wife, 20 Wis., 509.
Scherr vs. Schern, 23 Wis., 377.
Moore vs. Wilkinson, 13 Cal., 478.

And to-day there is no patent to Bunn.

Stark vs. Barrett, 15 Cal., 361.
Luse vs. Clark, 20 Cal., 387.

Offering the land for sale, selling it and taking Mitchell and Moore's money for it was deciding that Bunn at that time had no pre-emption right.

Boyce vs. Dans, 29 Mich., 149.

United States officer could sell the land notwithstanding pre-emption.

Busch vs. Donohue, 31 Mich., 482.

All presumptions are in favor of the patent

Collins vs. Bartlett, 44 Cal., 371.

A patent will be inquired into only where there is shown a prior equity.

Beson vs. Carey, 35 Iowa, 72.

3 *Washburn Real Property, 3d Edition*, p. 173, and cases cited in note 6.

Upon our seventh error, that the taxes against the land which Mitchell, Davis and Moore had paid to preserve the land was not allowed by the Court below against the land, and Robbins made to repay it out of the money to be raised on the sale to pay his mortgage. Here were two parties honestly, we say, so far as Robbins is concerned, contending for the possession of a fund—the land in question. The respondents, Mitchell, Davis and Moore, show that they honestly purchased the land and as a further evidence of their sincerity pay all the taxes from 1855 to 1874—eighteen years. Bunn pays no tax. Robbins pays nothing. The fund is by this payment of taxes preserved from sale and passing into the hands of other parties. A duty is due from it to the government which is levied yearly on this land after 1855, which had to be paid yearly to preserve the fund—to save it for either claimant. And yet the Court below say that this money, so paid by the respondents, need not be paid out of the fund, even if it bring more than Robbins's mortgage.

Even if the taxes had been paid by a party claiming the fund fraudulently, any tax of this kind paid by him, which of necessity benefited the honest claimant, a court of equity should order it paid out of the money arising from the sale as a first lien. It was vacant and unimproved land. (Rec. 121, T. copy 38.)

Estill vs. Estill, 3 Bibb. 177.

Our eighth error is: Bunn's mortgage to his father, Lewis Bunn, made only two days after he entered this land, and before he obtained his patent was void.

The words of the United States are, "And all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void." (See last clause of Section 12, act

of September 4, 1841.) We say the word right there means everything secured by the pre-emptor until he obtained his patent. It included the inchoate claim to the land and the land itself until he had received his patent, and to us plainly shows that congress meant and intended that the pre-emptor should not assign or transfer anything secured by him under the act until he had obtained his patent The limitation upon his acts, we think, shows clearly the intention. Congress and the General Land Office knew, and the records of this Court show, that the pre-emption laws have been fruitful sources of perjury. This limitation tried to and did prevent some of it. Respondent's answers put this fact in issue. Denies that Bunn at the time he made the mortgage owned the land or had the right to sell and convey it. The limitation in Section 12 is put upon all pre-emptors, and tends to make them permanent settlers and residents on the land upon which they settle, improve and inhabit. We think Bunn had no right to mortgage or sell this land unless he shows that at the date of the mortgage he had his patent The case at Bar shows the propriety of this construction. The object of the pre-emption laws was to obtain actual residents and settlers on the public lands, not to enter the tract and then mortgage it and the September after go and live on it one week. The intention as well as acts of settlement and improvement must be shown, and as the title to the tract was in the government until he got his patent, he had no right acquired by the act of 1841 that he could assign or transfer until the patent was obtained. Why were the words "prior to the issuing of the patent?" The money is usually paid in and a pre-emption proven some months before a patent is issued.

Garr vs. Allison, 5 Blackf. Ind., 63.

Robbins had only a mortgage on Bunn's interest in the eighty, south-half south-west, claimed by appellant; and on another eighty, south-half south-east, both making 160, only eighty of which there is any contest about. Should he not be compelled to exhaust under any circumstances that eighty before he gets appellant's title to the other eighty? We thought it a great stretch of equity for a court to touch appellant's title until he had foreclosed his mortgage against Bunn; sold the land, and the time for Bunn to redeem expired, and he had his deed; then he could show how his title could be injured; but as his title now is shown Bunn can defeat it at any time by paying the money.

Hilliard on Mortgages, pages 151, 152, and cases cited. Also, p. 156, Sec. 69.
Wright vs. Dudley, 8 Mich., 15.
Hunt vs. Wickliffe, 2 Pat., 201.
Hoofnagle vs. Anderson, 7 Wheat, 212.

Patents cannot be attacked only by some one with a prior right.

Lindsay vs. Miller, 6 Pat. 677.
Bordman vs. Reed, 6 Pat. 328.
Stringer vs. Young, 3 Peters, 328.
Provost vs. Gratz, 6 Wheat, 481.
Covander vs. Smith, 8 Iowa, 360.
Brill et al vs. Stiles et al, 25 Ill., 307, and cases there cited.

Robbins in this respect does not stand in as good a condition as Bunn would, because he has not yet acquired all of Bunn's title.

When it is rendered certain that he had acquired all of Bunn's right to this land, he would then have a better right to call on appellants for their title.

Both he and Bunn lie still for eleven years before any bill is filed; let appellants, or those under whom they claim, pay all the taxes; even up to 1874 no effort is made to pay taxes or get possession of the land

Appellants have claim and color of title for seven years under the Illinois Statute of Limitations, coupled with payment of taxes under Section 7, Revised Statutes of 1874, Revised Statutes of 1845, 104, Section 9, which reads as follows:

"Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of taxes for the term aforesaid, shall be entitled to the benefit of this section. Provided, however, if any person having a better paper title to said vacant and unoccupied land, shall during the said term of seven years pay the taxes assessed on said land for one or more years of the said term of years, then

and in that case such taxpayer, his heirs and assigns, shall not be entitled to the benefits of this section."

Appellants set this up in their answers and prove it on the hearing. We think this defense just as good in equity as in law.

Mooreland vs. Marsh, 19 Ill., 376.
Stearns vs. Gittings, 23 Ill., 389.
Beaver vs. Taylor, 1 Wall. U. S., 153.

and can only be defeated by either Bunn or Robbins coming in and paying for one year out of the seven.

Stearns vs. Gittings, 23 Ill., 387.
McCagg vs. Heacock, 42 Ill., 153.
Langdron vs. Hanes, 21 Wall., 530, 1 Story, Sec. 529

What more could Bunn and Robbins do than they did to show that they had abandoned all claim to this land? What stronger evidence of abandonment than a failure to settle and improve and inhabit this land and then never pay any taxes from 1855 to 1874? This conduct was fraudulent, and appellants were induced by this fraud to enter the land and pay the taxes.

On our ninth and last error, we say that Mitchell, Davis and Moore were not bound by the decisions of the register and receiver of any land office, but particularly not of the land office at Springfield, Ill., for these reasons: *First*—The law nowhere gives the land officers any right to decide between a purchaser at a public sale of lands for cash, or between a private entry made with cash and a pre-emptor. It is only when the contest is between different pre-emption claimants and the fact as to who made the first settlement, or which of the two or more pre-emptionists is entitled to the land. For this purpose and no other are they constituted a court of limited jurisdiction, and nothing is to be given them, but according to the letter of their powers. We quote the whole of Section 11 of the act September 14, 1841.

"And be it further enacted, That when two or more persons shall have settled on the same quarter section of land, the right of pre-emption shall be in him or her who made the first settlement, provided such person shall conform to the other provisions of this act; and all questions as to the right of pre-emption arising between different set-

tlers shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and a reversion by the Secretary of the Treasurer of the United States."

Revised Statute U. S. 1874, p 419, section 2273.

In this case we think we have shown that there was not even one settler on the tract; but there is no pretense of there being two settlers on the land claiming it.

It will be seen that by this section a contest between a party who had entered at public sale and pre-emptionist was never submitted to the land officers, and for the good reason that it was letting them decide upon their own acts and not upon the fact of when two or more persons settled upon the land.

These officers first put this land up for sale and induced Mitchell and Moore to buy it, received their money for it, and afterwards let Bunn enter it under his pre-emption. As to these land officers, there was no contest that could come up under Section 11, and after permitting all this to be done it will hardly be contended that these officers should be permitted to decide upon the validity of their own acts. One or the other of these acts was fraudulent. Bunn deceived them also in regard to his rights.

Second—There was not two settlers claiming the same,—no one but Bunn even claimed to settle on the land. It is conclusively shown by the record that this land was in Danville [Ill.] Land District; that it was entered by both claimants in that land district and at that land office. There never was any contest before the Register and Receiver of that land office; never was any two or more settlers on the land claiming it under pre-emption right. The two facts which give the Register and Receiver jurisdiction are both absent. There was not two or more persons settled on the same tract of land; not a contest arising between different settlers, but one was an entry for cash without notice and without proof of the filing of any declaratory statement or any settlement. No intendments are allowed in favor of courts of limited jurisdiction.

Osgood vs. Blackmore, 59 Ill., 261.
Swearingen vs. Gulick, 67 Ill., 209
Jones vs. Reed, 1 Johns., C. 20.

Wells vs. Newkirk, 1 Johns., C. 228.
Coffin vs. Tracy, 3 Cains, 129.
Dudley vs. Mahew, 3 Cains, 9.

Thirdly—But this case was never heard by the land officers of the land district at Danville, Illinois, except so far as to hear Bunn's proof and take his money. These same officers had in putting up the land and selling it at public sale decided that Bunn at that time had not filed his declaratory statement. (See Section 14 of act of September 4, 1841.) Notice must be in land office before land was offered for sale. Bunn knew of that sale to Mitchell and Moore when he paid his money, for he never did prove up his claim. (Lester's Land Laws, vol 1, 344, 382, 390, 396, 397, 398, 413.) Whatever was done was by the land officers of the Springfield, Illinois, land district. They were not allowed to hear the case at all, and their decision binds no one.

Fourthly—Because the land officers were imposed upon by the false evidence. Can this Court say from all the facts called out in this case that Bunn was a bona fide pre-emptor, honestly trying to comply with the law?

Lyttle vs. State of Arkansas, 22 How. U. S., 193.
Garland vs. Wynn, 20 How. U S., 6, and cases cited.

Bunn was guilty of a fraud upon the officers at the land office in proving up a pre-emption claim that he had not honestly made. Says himself that he put no improvement on the land until the fall after he made his claim at Danville, nor did he intend to reside on it then, *i. e.*, when he went down and stayed one week. He is never found cultivating it or inhabiting it afterwards.

Again: We say that the land officers at Danville, Illinois, were guilty of great negligence, amounting to fraud either upon Moore and Mitchell or upon Bunn, that ousts them of their jurisdiction in this case, in this: If Bunn's pre-emption was filed November 15, 1855, it was a fraud on both Mitchell and Moore for them not to file the same, mark the tract with red ink—the sign of danger—so that every one looking at the tract book could see it. Nothing of this kind was done. But it was a still greater fraud to put up the land, offer it for sale, induce men to bid it off, take their money for it, when they knew Bunn's pre-emption notice was in their office. But presuming that Bunn had

no pre-emption claim—was not filed when the land was put up and sold, what should the land officers at Danville have done when Bunn came to prove up his pre-emption? They certainly should have compelled him to have proven that he had commenced his improvement on the land he claimed prior to the date of their selling the same to Mitchell and Moore. Not a witness at any time or in any place swears to that fact. No one saw Bunn on the land until November 29, 1855, and then but by Winslow, (record 87, copy 27,) who commenced Bunn's house that day. Bunn before that time was never on the land, as shown by the proof before that time, and that was just fourteen days after the land was entered. But we say that Winslow was not correct in this, and that Bunn knew that by permitting this testimony to go to the land officers that he was perpetrating a fraud upon them He knew he did not settle on the tract or do any thing on it until the fall afterwards. Says he staid on it a week the fall after he filed his pre-emption claim. Winslow is contradicted by Bunn, (record 130, copy 37–8; and by his wife (Record 125.) Her deposition was taken May 3, 1867, nearly twelve years ago. Was in September on some land her husband had pre-empted in September, 1855; her husband had not pre-empted any land, so that it was 1856, just as Smallwood (104, 124, copy 31, 36) says, also evidence of Mitchell (record 120, copy 35) and Moore, (record 122–3,) and the evidence of Fulsom (record 82, copy 26) shows that Bunn was all this time a resident of McLean county, Illinois. Will this Court say that their is no fraud, no imposition, no mistake in this case? It seems to us that this record shows it fully, set up in the answer, stated in the bill, that Bunn owned the land at date of Mitchell and Moore's entry, [record 29, copy 10, amended bill 47, copy 16.] All this is denied by answers of Davis and Moore [record 54 to 61.]

There was actual fraud on Bunn's part in claiming to have settled and improved this land previous to November 29, 1855. There was fraud in his procuring Winslow to swear that he built the shanty November 29, 1855, and saw Bunn in it. This house was not built until fall of 1856.

There was fraud in Bunn trying to get this pre-emption claim allowed when all the time he was a citizen of McLean county, Illinois, and never lived in DeWitt county but one week. All these are Bunn's

fraudulent acts which imposed upon the land officers and caused them to make great mistakes, if not perpetrate actual fraud upon appellants.

We think we have brought ourselves within the strictest rules laid down in this Court in

Johnson vs. Towsley, 13 Wallace, 72.
Warren vs. VanBrunt, 19 Wallace, 653.
Shipley et al vs. Conn et al, 1 Otto, 330.

Appellant Moore has his patent; Bunn has none; and by all reasoning of this Court in the cases last above cited, and in

Stark vs. Starr, 6 Wallace, 418–19,

should prevail. For these reasons we think the judgment of the Court below should be reversed.

C. H. MOORE, *Pro. Se.*

Supreme Court of the U. S.

CLIFTON H. MOORE,
DAVID DAVIS
vs.
RUFUS W. ROBBINS

No. 256

P. PHILLIPS,
W. HALLETT PHILLIPS,
for Plaintiffs in Error.

Supreme Court of the U. S.

CLIFTON H. MOORE,
DAVID DAVIS
vs.
RUFUS W. ROBBINS.

No. 256.

Brief of P. PHILLIPS and W. HALLETT PHILLIPS,
for Plaintiffs in Error.

The case is this: At a sale of the public lands made on the 15 November, 1855, at Springfield, Illinois, John P. Mitchel purchased 280 acres, and Clifton H. Moore 160 acres at the price of over $2.50 per acre.

Certificates of purchase were issued to these parties, pp. 34, 35, and subsequently a patent was issued to Moore. p. 38.

The land purchased by Mitchel was sold under a judgment against him and a deed of the Marshal executed to Theron G. Butler, one of the plaintiffs in said judgment, who afterwards, for a valuable consideration, conveyed to Judge David Davis 40 acres thereof.

The opposing title is that of Thomas J. Bunn, who claims 160 acres as a pre-emptor under the act of 1841, by virtue of a settlement alleged to have been commenced on 8 November, 1855.

One portion of these 160 acres is included in Mitchel's purchase and the other in that of Moore.

The litigation of these conflicting titles is by a bill in Equity brought in the State Court by Rufus W. Robbins claiming to be the assignee of a mortgage executed by Bunn on 22 February, 1856, to Lewis Bunn to secure the payment of a promissory note for $1,000.

This Bill prays for a foreclosure and sale, and makes Moore a defendant, on the allegation that he claims a portion of the premises under a pretended purchase from the Government of the United States. p. 10.

The bill was subsequently amended and avers that a patent had been issued to Moore by mistake for 40 acres of the land claimed by the complainant, and that at the time of his purchase *he had full notice* of Bunn's pre-emption claim, and that when he obtained the patent he well knew that Bunn had paid for the land.

It then avers that "one David Davis claims to have some interest in the premises, and insists that he has no title as against the pre-emptor Bunn.

The prayer is, that Moore convey to said Bunn the legal title to said 40 acres "*which he now holds as trustee in bad faith for said Bunn*," and that the pretended title of Davis be cancelled, as a cloud upon the title of said Bunn. p. 16.

Moore, in his answer to the amended bill, avers that his purchase was "first in point of time, and that when he entered the land no valid pre-emption was thereon, nor was there any notice filed in the Land Office, that the land was claimed by Bunn, nor did he ever live on the land with intention of making it his home, nor were any improvements made on the land when he entered the same, and that he had no notice of any such claim." p. 18.

Judge Davis, also filed his answer setting up his title

under Mitchel, who, he avers, purchased at the public sales "without any knowledge of any pre-emption or other claim of said Bunn, and before any such claim was made at the Land Office."

It further avers, that at the time the judgment was obtained against said Mitchel, both the plaintiff and defendant, Mitchel, supposed and believed that Mitchel's title was good, and that said Butler was an innocent purchaser "without knowledge of Bunn's claim, and that there was no actual or constructive notice of said Bunn to said 40 acres." p. 19.

The final decree was in favor of the complainant. The mortgage was held to be a lien on all the land described therein, and it was declared that "Clifton Moore and David Davis have no rights in said land that are not subject to said mortgage." (P. 6.) This was affirmed in the Supreme Court.

Assignment of Errors.

To reverse this decree the writ of error is now sued out on the assignment that the case presented no equity as against the defendant's title, and that the Court erred in overruling the objection made to the evidence from the Land Office.

When Bunn's claim was first before the General Land Office, it was rejected by the Commissioner, who, on the 30th September, 1858, cancelled the certificate issued to Bunn by the Register, dated 20th February, 1856. (P. 24.)

The decision of the Commissioner, on appeal to the Secretary, was reversed by him on the 22d June, 1860. (P. 25.)

On the trial of the case, the complainant produced in evidence a certified copy of the proceedings in the Land Office, to all of which Moore and Davis objected; and their objection was overruled. (P. 34.)

Proceeding now to inquire into this conflict, and whether, under the law, Moore and Mitchel, the purchasers at public sale, acquired title to the premises, we first advert to the act of 1841, under which Bunn claims in opposition to the purchasers.

This act, after providing for pre-emptions, enacts, in its 14th section, as follows:

"This act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the President, *nor shall any of the provisions of this act be available to any person who shall fail to make the proof of payment and file the affidavit required, before the commencement of the sale aforesaid.*"

We believe that a similar provision will be found on examination to be applied to all pre-emption laws.

While, however, by the 14th section, the pre-emptor could not avail himself of the benefit of the act, if he failed to perfect his title before the day of sale, the following 15th section allowed persons who intend to purchase under the provisions of the act *thirty days after settlement* to file their written declaration and *twelve months* in which to make payment.

This 14th section of the act of 1841 is a transcript of the 4th section of the act 29 May, 1830 (4 Stat., 420), and the question whether the rights conferred on the pre-emptor was subject to the limitation in the 4th section

of that act was submitted to Attorney General Butler in 1837. As to this he says:

"A failure to make payment before the day appointed for the commencement of the sale of the public lands, will, as a general rule, *involve a forfeiture of all the privileges held out by the act.* This (says he) is the necessary effect of the 4th section of the act of 1830, which provides that none of the provisions of the act shall 'be available to any person who shall fail to make the proof and payment required before the day appointed for the commencement of the sale of lands including the tract or tracts on which the right of pre-emption is claimed.'"

The head-note to this opinion is as follows: "A failure to pay for a pre-emption before a public sale of the lands in which it is situated, *forfeits the right;* it may be saved, however, by a tender of payment in due time."

Opinions, 3 vol., 211.

In accordance with this view of the provision, all proclamations for the sale of public lands contain a notification to pre-emptors that they must perfect their title by making proof and payment prior to the day of sale.

This provision is not only found in the pre-emption acts prior to 1841, but also in those subsequent thereto.

Thus, in the act 3d March, 1853, extending the right of pre-emption to the alternate reserved sections along the line of railroads, it is declared to be the privilege of persons residing on said lands to pay for the same, in preference to any other persons at any time, *before the same shall be offered for sale at public auction,*"

10, Stat. 244.

And so in the act 27th March, 1854, conferring pre-emption rights on those who had settled prior to the withdrawal from market of the lands "in consequence

of proposed railroads—the condition is annexed, that *they must prove up their rights, and pay for the same before the day fixed for the restoration of said lands to market.*"

10, Stat. 269.

The evidence shows that the land claimed by Bunn is 4½ miles from the Illinois Central Railroad, and that the land joining on the west and east are railroad lands, and so are the lands on the north and south.

(Smallwood's Deposition, p. 30.)

Giving to the 14th and 15th sections their true interpretation and effect, it comes to this, that while as a general proposition the pre-emptor has thirty days for filing his declaratory statement and twelve months for making payment, there is excepted from this, the condition of public sales. When these take place, the pre-emptor holds subject to the provisions of the 14th section.

It is not pretended that when this public sale took place the pre-emptor had perfected his title.

The allegation by him is that he commenced his settlement on the 8th November, and the sale took place one week thereafter.

It is unnecessary to argue, that this right of pre-emption until perfected, is a mere bounty conferred by legislation, and the right must be taken subject to the conditions imposed by the grantor.

The nature of the pre-emption claim is fully described in *Whitney* vs. *Frisbie*, where it was held that though Whitney "had gone upon the land, built a house and barn, enclosed some of the ground and offered to make his declaration for permanent settlement under the pre-emption laws," yet all this did not confer on

him a vested right, and the land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the purchase money.

9, Wall. 187.

Such being the nature of the claim, we submit that Bunn, when he made his settlement was subject to the contingency that, if a public sale took place, he could only preserve it by a full compliance with the provisions that would vest a title in him prior to the sale.

Again, we submit that the decision of the Secretary overruling that of the Commissioner, and holding that Bunn had a valid pre-emption, does not deprive the purchasers from insisting before the Judicial Department on the validity of their title.

This is not a contest between two pre-emptioners or settlers in which the Land Office is permitted finally to adjudicate the questions of fact involved in the controversy, but is one by which the title of the purchaser as against the pre-emptor can only be determined by the Court.

The 11th section of the act of 1841 provides, that all questions as to right of preemption arising between *different settlers* shall be settled by the Register and Receiver subject to an appeal and revision by the Secretary of the Treasury.

The act 26th Jan., 1856, extends the jurisdiction of the Commissioner, which was conferred by the act of 1846 to "locators under bounty land warrants, as well as to ordinary entries, or sales, and to all *other* preemption cases or locations, where the law has been substantially complied with and the error or informality has arisen from

ignorance, accident, or mistake, and is satisfactorily explained, *and when the rights of no other claimant or preemptor will be prejudiced, or when there is no adverse claim.*"

11 Stat, 22.

And by the 10th section of the act 12th June, 1858, the 11th section of the act of 1841 *supra*, is so amended, that the appeal from district officers, in cases of contest between different settlers for the right of preemption, shall hereafter be decided by the Commissioner, whose decision shall be final unless an appeal be taken to the Secretary of the Interior."

11 Stats., 326.

We then take for granted, that it is a *judicial question*, whether the purchaser acquired a valid title as against the preemptor as well as against the United States, and not one for the final determination of the Land Office.

If, then, the construction we have given to the 14th section of the act of 1841 be the true one, Bunn has no standing anywhere as a preemptor, for he had not complied with its provisions before the day of sale, and this would end the controversy.

If our construction be not the true one, or that this section does not apply to the case in hand, we are then led to inquire whether Bunn had complied with the provisions of the 15th section, by which the preemption right was forfeited if the preemptor fails "to file with the Register of the proper district within thirty days next after the settlement a written statement describing the land settled on, and declaring his intention to claim the same under the provisions of this act."

In the proceedings of the Land Office introduced by Bunn, is found the written statment, dated the 8 No-

vember, 1855, signed by Bunn, and attested by one E. J. Ives.

On this paper there is no *file mark, nor is there any evidence to show that it was lodged with the Land Office within the thirty days.*

There is no evidence that the attesting witness, Ives, had any connection with the Land Office.

On this fundamental fact, no officer of the Land Office or any other witness was examined to show that this paper was filed or delivered to the land officer to be filed.

That this statement was not in the proper land office at the time when the sale took place would seem to be evident from the fact that the government officials offered the lands at public auction as subject to sale. We must assume, in the absence of evidence to the contrary, that officers do their duty and act in good faith.

The purchasers had a right to act upon this assumption, and if it is now asserted that a mistake has been made by both, by which the right of the preëmptor has been invaded, the Court will require of him the *best and clearest evidence to establish it.*

The presumption that all public officers perform their proper official duties, until the contrary is proved, is strongly stated in the *Philadelphia & T. R. N.* vs. *Simpson*, 14 Pet, 448.

We have already adverted to this evidence to show that there is an entire failure in the proof of the filing or lodging of this statement, and we only now call attention to the statement of Bunn himself, to show how shadowy is the presumption that it was filed within the time prescribed.

He is asked—can you give the date of your residence there?

Ans. My impression is, it was in September, 1855.

Ques. Was it the year you filed your preëmption claim?

Ans. *If I filed the preëmption claim in the winter, which is my impression*, then it was the next fall I went there.

There is, then, an entire failure derived either from the paper itself, or from the evidence of the land officers or from Bunn himself, that the statement was filed, or even deposited in the Land Office within the thirty days from the date of settlement.

The importance of this question is discussed in the case of *Megerle v. Ashe*, 33 Cal., 91. There the question of title depended upon the filing of a survey approved by the Surveyor General 19th October, 1855. The only proof offered was the map itself, with this endorsement: "Filed 5 Dec'r, 1855, Marysville Land Office."

The time of the filing was important; for, till the lands were fully surveyed, the plaintiff was not authorized to file his declaratory statement; and, if this was not filed within three months after filing of the plats in the Land Office, the pre-emption right could not connect itself with the prior possession.

On this it was held "that this naked unauthenticated endorsement, of itself, is not evidence of the date of filing. Standing by itself, (say the Court,) it was of no value, and it was therefore impossible to determine from the record whether Megerly's declaratory statement was filed in time to connect his pre-emption right with his original entry, so as to protect him from that date, or whether Terry's school-land warrant was duly located."

But in the case now before the Court, the paper is not even *marked as filed*.

There is, however, in the Land Office proceedings introduced by Bunn, a letter of the Secretary of the Interior of the 22d June, 1860, which overruled the decision in favor of the purchasers, made by the Commissioner, and under which the certificates and patent had been issued.

The letter contains the following statement: "In regard to this case as simply one between the United States and the pre-emptor, *Moore, having made his adverse entry at the time when the records of the Land Office showed that Bunn was a claimant* upon the same land by pre-emption, and upon complying with the requirements of the act of 1841, would have a superior right. (P. 24.)

Does this statement of the Secretary, charging Moore with constructive notice, operate as a thing adjudged? We submit that it does not.

As we have seen, the complainant's bill proceeds upon the allegation that the purchaser "had full notice that Bunn claimed the land as a pre-emptor," and the prayer is that he convey the legal title which he holds as trustee in bad faith.

The frame of this bill implies the admission that if the purchaser was in good faith, and had no notice, either actual or constructive, of Bunn's claim, there would be no ground for relief in equity.

In this contest before the Court between the purchaser and pre-emptor, to set aside the legal title conveyed by the Government to the former, the pre-emptor must establish his right by showing a full compliance with the provisions of law. He must do this by competent evidence for this purpose, and cannot rely on any recital made by an officer in the same department, however exalted may be his position.

This matter was considered in the case cited from 33

Cal. There, as here, the proceedings in the land office were introduced and relied on by the pre-emptor, and the Court instructed the jury that he had shown a compliance with the laws and regulations entitling him to a pre-emption.

This was held by the Supreme Court to be error· "The instruction (say that Court) was doubtless given under the idea that the decision of the Secretary of the Interior, together with other official documents, showed both the qualification and performance on the part of the plaintiff, and that they were conclusive of that matter; but, as already stated, they were not admissible as evidence of those matters as against third persons. The facts going to show performance were for the jury, and, when found, it was the province of the Court to declare their effect"—p. 85.

But, again, the equity of the bill proceeds on the ground that the legal title held by defendants should be conveyed to complainant, because their purchase was made under circumstances which affected their conscience, that is, they purchased knowing of the rights of the complainant, and so the bill designates them as "trustees in bad faith."

Now, as already stated, the answers deny in the most express terms that the purchasers had any knowledge of Bunn's claim. These answers are responsive to the bill and are sustained by the depositions.

There is not a particle of proof to show that the purchasers had *actual* notice, and the only thing in the record which would charge them with *constructive* notice is the recital in the Secretary's letter, which we maintain is not sufficient for that purpose.

Furthermore, there is nothing as to the evidence of improvements which would so operate on the good faith of the purchasers as to bring them within the rule laid down in Hughes, U. S. (4 Wall., 236), that a patent will be set aside when obtained against the open, notorious and exclusive possession of the pre-emptor.

The possession here referred to was a sugar plantation then under culture.

What was the character of the possession in the case before us? It is not pretended there was an enclosure, nor that the land was in cultivation. Were there any improvements on the land which could put the purchasers on their guard?

The witness, Winslow, examined by Bunn, was employed by him as a carpenter. He testifies that he commenced to build a house on the premises in dispute on 29 November—(*this was fifteen days after the sale*).

He says that at that time there was a shanty, consisting of two forks, set in the ground; there was a pole resting on the posts or forks, and covered with boards nailed on the pole.

He further says, this could not form a residence for a family, nor could it be considered as forming part of any permanent improvement upon the land.

When asked if a person could stand up in this shanty, he answers "he does not know." p. 28.

We then submit, that even if it were proved that this shanty was on the land at the date of the public sale, that it constituted no such notorious possession as to charge the purchasers with notice

On these considerations, as well as those stated in Mr. Moore's brief, we ask for a reversal of the judgment.

P. PHILLIPS,
W. HALLETT PHILLIPS,
for Plaintifs in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1877.

CLIFTON H. MOORE, ET AL.,
—vs.—
RUFUS W. ROBINS, ET AL.

WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

This is a Writ of Error to the highest Court in the State of Illinois.

The jurisdiction of this Court is claimed on the ground that the decision of the State Court involves the construction of an Act of Congress, and the action of one of the executive departments of the General Government.

The facts of the case are briefly these:

On the eighth day of November, 1855, one Thomas J. Bunn, settled, as a preemptor, on a certain quarter section of land in the then Danville Land District, in the State of Illinois, and made affidavit according to law to that effect, and afterwards entered and paid for the land under the pre-emption law. On the 15th of November, 1855, plaintiff in error, (Moore,) purchased at a sale, at the land office, forty acres of the land, and on the same day, one John P. Mitchell, purchased another forty acres, and

plaintiff in error, (Davis,) claims the interest of Mitchell by mesne conveyances. Before any patent issued to any of the land, Moore gave notice to the Register and Receiver of the Land Office, at Springfield, [to which place the office had been moved from Danville, all the land offices of the State having been consoldiated at Springfield,] that he desired to and would contest the facts of Bunn's pre-emption. This action suspended the issuing of a patent to any of the parties until the contest was disposed of. The contestant was heard on full proofs made by all the parties before the register and receiver, and they decided that the pre-emption of Bunn was *bona fide*, and that a patent should issue to him for all the land. From this decision, Moore appealed to the Commissioner of the General Land Office. The commissioner reversed the decision of the register and receiver, and thereupon issued a patent to Moore for the forty acres purchased by him; but Bunn appealed from the decision of the commissioner to the Secretary of the Interior, who, after full argument, reversed the decision of the Commissioner, and reinstated the decision and judgment of the register and receiver, and ordered the patent to Moore to be returned to the office for cancellati on, and that a patent be issued to Bunn for the whole. Moore was notified of this decision, but refused to comply. This final action of the department took place January 29th, 1860. (See record p. 25, decision of the Secretary of the Interior.)

The matter thus stood before the department until 1868, when Moore applied to the Secretary of the Interior for a re-hearing of the case, and on such application, a rehearing was denied. (See letter of the Secretary to the Commissioner of the General Land Office, Record, pp. 33, 34.)

It is proper to remark that the first action of the department in this contest, was before Davis acquired such rights as he has. Bunn entered and paid for his land, regularly as a pre-emptor, and afterwards made a mortgage on it to secure a note of $1,000, which note and mortgage, by regular purchase and assignment, became, and now are, the property of Robbins, defendant in error in this Court.

Robbins filed a bill in one of the Circuit Courts of the State of Illinois, to foreclose this mortgage. By the original bill (which will be found beginning on page 9 of the record,) Davis was not made a party. The bill, according to a statute in Illinois,

waives the oath to the answer. Such an answer is not evidence. Moore answered. His answer will be found commencing on page 13 of the record. Afterwards the bill was amended and Davis made a party. The amendment will be found commencing on page 15 of the record. This amendment makes Davis a party. Moore answers this not under oath, and answers as solicitor for Davis. These answers will be found beginning on page 18 of the record. The cause progressed to a final hearing and decree. (For decree, see record, page 22.) The decree gave Moore his forty acres, but decided that the mortgage was a lien on the forty acres claimed by Davis. From this decree both parties appealed to the Supreme Court of the State of Illinois, both parties assigned errors, and the case was reversed on the errors assigned by Robbins. Moore, in behalf of himself and Davis, applied to the Supreme Court of Illinois for a rehearing, which was granted, and on the rehearing the original decision was adhered to by the Court.

The decree of the Supreme Court of Illinois reverses the decree of the court below for errors apparent in the record, and orders that the cause be remanded to the court below for further proceedings. From this opinion of the Supreme Court a writ of error was issued out to this court, and was dismissed for want of jurisdiction.

Moore vs. Robbins, 18 *Wall.*, 538.

Afterwards a decree was rendered in the inferior State court in accordance with the opinion of the State Supreme Court, from which an appeal was taken to the State Supreme Court, and the decree of the inferior court was affirmed, from which last decree this writ of error is sued out.

We think only the following questions can properly arise in this case. First. Will this Court review a decision of the land department in adjudicating the facts of settlement, entitling a party to the right to a preemption under the act of 1841, when the facts have been fully adjudicated by that department, on a full hearing of the parties, and appeals have been carried up to the Secretary of the Interior, and where no fraud or mistake is alleged on the part of these officers, and no pretence that they have acted *ex parte* or on perjured testimony? In short, will this Court take up the evidence that was

submitted to the department on such a contest, and pass on it as an original question, without regard to the decision of the departments, or is such a decision of the department final?

And second, does an alienation by way of mortgage of the title of one who has purchased and paid for his land, but before the issuing of a patent, make void his title to the land, so that a party other than the government can have such title decreed to be void, on account of such attempted alienation?

And on these questions we submit the following points, that we believe to be fully sustained, both on principle and authority, and within the decisions of this court:

POINT I.

"When the law has confided to a special tribunal the authority to hear and determine certain matters of fact arising in the course of its duties, the decision of that tribunal, within the scope of its authority is conclusive upon all others."

Johnson vs. Towsley, 13 *Wallace*, 72, (83).

Wilcox vs. Jackson, 13 *Peters*, 498, (511).

Lytle vs. State of Arkansas, 9 *Howard*, 314.

Hess vs. Bollinger, 48 *California*, 349.

Lamont vs. Stimson, 3 *Wis.*, 545.

Quinn vs. Keegan, 38 *Cal.*, 499.

Moore vs. Wilkinson, 13 *Cal.*, 478.

And we would respectfully refer this Court to the opinion of the learned Chief Justice of Illinois, in this case in that Court, as a better argument than we can make on the point.

Robbins vs. Bunn, 54 *Ill.*, 49.

POINT II.

What the statute means in saying, as it does in the act of Sept. 4th, 1841: "All assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void," is that an assignment or transfer of the right to prove up a settlement and pay for the land as a preemptor, before proof

and payment, are void; in other words the right to a preemption before the title is adjudicated by proofs and payment, is not transferable.

Quinn vs. Kinyon, 38 *Cal.*, 499.
Robbins vs. *Bunn*, 54 *Ill.*, (54.)

POINT III.

The preemption laws are to be liberally construed to carry out the benificent policy of the law in favor of this meritorious class of citizens.

Clement vs. Warner, 24 *Howard*, 394.
Silver vs. Ladd, 7 *Wallace*, 219.

ARGUMENT.

We had supposed it was the well settled law of this Court, as well as of all others, to decline to rehear questions of fact that had been passed upon by a tribunal created for that particular purpose, where no appeal was given, unless the mode pointed out by the statute had been followed.

This precise question has been frequently before this Court, as will be found by a reference to the cases above quoted. The case of *Johnson vs. Towsley*, 13 *Wall.*, *supra*, as far as we are advised, is the latest utterance of this Court upon the question. In that case the whole question was considered and the previous decisions of the Court reviewed, and the doctrine placed upon this basis: that on questions of fact where the hearing had not been *ex parte*, and there was no charge of fraud or mistake of fact on the part of the officers, no allegation that the decision had been procured by perjured testimony, the decision of the department was final, and could not be reviewed by the Courts, but if the officers misconstrued the law their decisions were not binding on the Court. We have quoted from that opinion on page 83, the language at the head of our first point.

The 12th section of the act of September 4th, 1841, (the act under which this preemption right is claimed,) is as follows:

"That prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improve-

ment thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, (agreeably to such rules as shall be prescribed by the Secretary of the Treasury,) who shall each be entitled to receive fifty cents from each applicant for his services, to be rendered as aforesaid."

The 11th section provides who shall determine the right between two rival preemption claimants to the same tract of land, and then the 12th provides how the facts necessary to constitute a right of preemption are to be determined in such a case as this.

Statutes at Large, V. 456.

We think the case of Johnson vs. Towsley fully sustains our view. In addition to the language from that opinion above quoted, we would call the attention of the Court further to that opinion. On page 86 occurs the following:

"It is fully conceded that when these officers decide controverted questions of fact in the absence of fraud or imposition or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them, they by misconstruction of the law take from a party that to which he has acquired a legal right under the sanction of these laws, the courts are without power to give any relief."

We have no desire to controvert this doctrine. This is simply holding, as we now contend, that on questions of fact, in the absence of fraud *in these officers*, their decision is final, but not, of course, on questions of law. This is a principle against which no sound legal mind would for a moment object—it is merely a repetition of the same doctrine in the case of Wilcox vs. Jackson, 13 Peters, *supra*.

Again, on page 87, 13 Wallace, the court say:

"This Court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government."

The decision in the case in 13 Wallace, is merely that a construction of law by the officer of the department, does not control

the courts; but on questions of fact, which the law has confided to their decision, in the absence of fraud, imposition or mistake on their part, their decision is final; this is all we are contending for, and all the Supreme Court of Illinois decided in its opinion in this case. It will be found on examination of the answers of Moore to the original and amended bill, and of Davis to the amended bill, that there is not a single allegation of fraud, imposition or mistake in the officers of the department. All the allegations of fraud are aimed at Bunn, nor does counsel in his argument claim that the officers of the department were guilty of fraud, accident or mistake; simply an error of judgment. The record shows a full trial on full proofs by Moore and Bunn, before the register and receiver. Their decision on the simple questions of fact was that Bunn was a settler in good faith on the land before its entry by Moore. This is simply a question of fact, the decision of which the law confides to these officers. It was not decided *ex parte*, but on full proof, without fraud on their part. There is no question of law involved in the decision.

Moore, eight years afterwards, and after getting all the additional evidence he could, asks the department to reopen the case, and the department again reiterates its former decision.

See decision of Secretary Otto, record, page 33.

He now comes into this Court and asks it to take jurisdiction and reverse a decree of the Supreme Court of Illinois. Such a decision of the department on a simple question of fact, on a full hearing and argument, and in absence of all fraud, even intimated against the officers making it, should not be disturbed. The whole argument on this branch of the case is but a reiteration of his argument on the facts made; first to the register and receiver at Springfield, afterwards to the commissioner of the general land office, and twice before the Secretary of the Interior, then twice before the Inferior Court of Illinois, and three times before the Supreme Court of Illinois. It is now redressed and appears in this Court in the attitude of a shabby, genteel man, well patched, darned and brushed, and we would respectfully suggest, that after having done duty so many years, and before so many different tribunals, and with such small success, it ought, in all charity, to be mustered out of service, and consigned to the limbo of forgotten eloquence. That this Court has always taken a favorable view of both the law and the facts in the case where a preemptor's

title was questioned by a speculator, is natural and to be expected. It is but following out the established policy adopted by the legislative department of the government. That such has been the view of the Court, we cite

Clements vs. Warner, 24 *How.*, 395.

But we are not asking in this case anything but the well established, familiar rule, that this tribunal having been appointed by law to decide a question of fact, its decision will not be reviewed by a court unless on the ground that the special tribunal acted through fraud or mistake. No fraud is alleged, nor any mistake. The most that is alleged is an error of judgment. We submit, then, that this Court will not open this question of fact, especially where the pleadings do not set up fraud, accident or mistake on the part of the officers, or charge false evidence or an *ex parte* hearing; but even if it should, we presume this Court would come to the same conclusion to which so many other tribunals have arrived, that have passed upon the facts that they were properly found by the register and receiver in the first instance. But we submit, that on this question the Court will not take jurisdiction. This Court, as we understand it, cannot take jurisdiction of a decision of a State Court on a question of fact, and all that can be said of the decision of the Supreme Court of Illinois on this question is, that it found the facts wrong. This gives this Court no right to review its finding on the facts. The only effect of the opinion of the Supreme Court of Illinois will be, as the Court says in Johnson vs. Towsley, it ought to do, is to take the patent title from Moore and vest it in Bunn, who was a preemptor, and had the right of preemption before Moore's entry. Moore's certificate, like all such, declares that his purchase is subject to any right of preemption that may be proved up afterwards. He took his certificate of purchase subject to this condition on the face of it, and as matter of law such preemption was proved up in the opinion of the officers of the government, whose duty it was to pass on the fact of such preemption existing. He obtained the patent in fraud of this right, and holds the legal title thus acquired in trust for Bunn, or the defendant in error in this case. Moore was notified to return his patent and withdraw his money immediately on the first decision of the Secretary of the Interior, but declined to do so. We do not desire to add anything further on this point.

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In reply to the suggestion of counsel for plaintiff in error that the land in controversy in this case is not subject to pre-emption, as being a part of one of the sections alternate to those granted to the State of Illinois, in aid of the construction of a rail-road, we would say in brief:

First, this record discloses no such fact, and

Second, if it did, it has been expressly decided by this Court that such alternate sections were subject to preemption by settlement made at any time before the sale in a case where this was the direct and only question before the Court.

Clements vs. Warner, 24 *How.*, 394.

On the point made by counsel for plaintiff in error, that the mortgage of defendant in error is void, because it was made before the patent issued, we cannot make as able an argument as is made in the opinion delivered by the Chief Justice of Illinois on the rehearing of this case in the Supreme Court of Illinois; we take the liberty of printing that opinion as a part of our argu-here. It will be found reported in Robbins vs. Bunn, 54 Ill., 54:

"A rehearing having been granted in this case, we have "again considered it, but see no reason to doubt the soundness "of the conclusions announced in the former opinion filed herein. "It is unnecessary to add anything to that opinion, in regard to "the questions which it discusses. We will, however, state our "conclusions upon another point not pressed in the first argu-"ment, nor considered by the court; but upon which stress is "laid in the petition for rehearing, and in the second argument. "It is urged by counsel for appellee, that as the mortgage was "made by the preemptor, before the patent was issued, it was "void, and Robbins took nothing by the assignment. This posi-"tion is founded on the twelfth section of the preemption law of "1841, which reads as follows:

"*And be it further enacted*, that prior to any entries being "made under and by virtue of the provisions of this act, proof "of the settlement and improvement thereby required shall be "made to the satisfaction of the register and receiver of the land "district in which such lands may lie, agreeable to such rules as "shall be prescribed by the Secretary of the Treasury, who "shall each be entitled to receive fifty cents from each applicant

"for their services to be rendered as aforesaid; and all assign-
"ments and transfers of the right hereby secured, prior to the is-
"suing of the patent, shall be null and void."

"It is insisted that under the last clause in the foregoing
"section, the mortgage is void. In order to arrive at a satisfac-
"tory conclusion as to the meaning to be given to this section, it
"must be considered in connection with the next, or thirteenth
"section of the same act. That provides that, before any person
"claiming the benefit of the act, shall be allowed to enter the
"land occupied by him, he shall make an affidavit before the
"register or receiver, stating certain facts, one of which is, that
"he has not made a contract with any person by which the title
"to be acquired by him from the government will inure in
"whole or in part, to the benefit of any person except himself.'
"The section further provides, if he swears falsely in the pre-
"mises, he shall forfeit the money which he may have paid for
"the land, and his right and title to the land and any grant or
"conveyance which he may have made, except in the hands of
"*bona fide* purchasers, for a valuable consideration, shall be
"void.

"We think it evident, from these two sections considered
"together, that the government was seeking to protect itself
"against claims under settlements not made in good faith, for
"the purpose of occupancy by the settler himself, but made
"with a view of securing the title of desirable lands for specula-
"tors. In order to accomplish this, the twelfth section makes
"null and void all assignments, of the right hereby secured, before
"the patent issues. What is the right hereby secured referred
"to in this phrase? It is simply the right of preemption, the
"right to purchase the land at the government price, in prefer-
"ence to any other person, and before it is offered at public sale.
"Any transfer of that right is forbidden, and any contract made
"before the purchase from the government is completed by which
"the settler should agree to convey his title when required, to
"another, would be void.

"While the twelfth section refers simply to the right of pre-
"emption existing in the settler, before the preemption of pur-
"chase is actually made, and applies to such right the appro-
"priate words 'transfer' and 'assignment,' the thirteenth sec-
"tion in declaring the penalty for a false affidavit, provides for a

" forfeiture both of the money and of the title to the land, unless " it has passed into the hands of an innocent purchaser.

" The conveyance which is pronounced void in this section, " in case of perjury, and if not made to an innocent purchaser, is " not a transfer of the right of preemption referred to in the twelfth " section, but a conveyance of the title acquired by the purchase, " and hence the use of the appropriate words 'grant' and 'con- " veyance.' Hence, too, the exception in favor of innocent " purchasers. A person buying after the land has been entered, " whether before or after the patent is issued, would be an in- " nocent purchaser, if buying without knowledge that the " affidavit was false, and hence his rights are saved. But there " is no saving clause for innocent purchasers in the twelfth sec- " tion, because in the transfer of the mere right of preemption " before the land is entered, there can be no innocent purchaser. " The purchaser buying only a right of preemption, would be " chargeable with knowledge that he bought in violation of the " law. The error in the argument of counsel for appellee lies in " the assumption that the right, the transfer of which is pro- " nounced void by the twelfth section, refers not only to the " right of preemption, but also to the title acquired by the actual " purchase of the land, the payment of the money therefor, and " the receipt of a certificate of entry. The only ground for such " a construction is the use of the phrase 'prior to the issuing of the " patent,' in the clause forbidding the assignment of the right. It is " certainly an inaccuracy to speak of the right of preemption as ex- " isting until the issuance of the patent, when the right has been " exercised, and the person possessing it has made his proof, paid " his money, and received a certificate of purchase, which would " entitle him by its express terms to a patent as soon as it should " be presented to the commissioner of the general land office. " Evidently the phrase was carelessly used, and must be con- " strued as referring not to the date of the actual issue of the " patent, but to the time when the right to it actually accrues, " that is, the time when the land is purchased. The words in the " act are, in fact, surplusage, for any attempted assignment of " the right of preemption would necessarily be prior to the is- " suing of the patent, and also prior to the entry of the land.

" That we are not mistaken in our understanding of what is " meant by the right, the transfer of which is prohibited, is shown " by recurring to the previous legislation of Congress. In the

"third section of the preemption act of 1830, we find the follow-
"ing words: 'All assignments and transfers of the right of pre-
"emption given by this act prior to the issuance of patents, shall
"be null and void.' Here the right which is not to be transfer-
"red, is expressly defined. It is the right of preemption. This
"act, by its terms, was to remain in force but one year, and in
"1832, after the act had expired, another act was passed, con-
"taining but one section, which merely provided that certificates
"of purchase, issued under the act of 1830, might be assigned,
"and patents be issued in the name of the assignee. This act
"was, doubtless, passed to remove any doubts which might
"arise under the first act, and shows clearly that it was not the
"policy of Congress to prohibit the transfer of certificates of
"purchase. These different acts will be found in the appendix
"to the second volume of Parple's Statutes.

"It is incomprehensible that Congress should have intended
"to prohibit the sale of lands by purchasers from the govern-
"ment, until they had received their patents. Such a prohibi-
"tion would have been not only grossly unjust, but so far as we
"can see, without object. When government, by its officers, was
"duly satisfied of the right of preemption, and had, in the mode
"pointed out by law, made sale of a tract of land and received
"the purchase money, it held the legal title only as trustee, and
"the purchaser was entitled to it as soon as the patent could be
"issued. But considerable delays would frequently and prob-
"ably generally occur in the issuing of patents, and to prevent
"the owner of land, for which he had fully paid, from
"selling it until the patent should be received, would be to the
"last degree unreasonable. If it were conceded that the
"government could impose such a condition upon purchasers and
"that it designed to do so, it should be construed merely as a
"condition of which the government alone could take advantage.
"But we have no idea the government intended to impose such
"a condition. As a matter of fact, certificates of entry have
"always been considered assignable in this State, and by the
"fourth section of the chapter of evidence, they have been made
"evidence of legal title, on which recovery could be had in
"ejectment, either by the person making the entry, his heirs or
"assigns, unless a paramount title is shown.

"We are of opinion the mortgage in this case being made
"after Bunn entered the land and received his certificate, was
"not void under the Act of Congress.

"We are also of opinion the defendants were not entitled to "have the taxes paid by them made a prior lien to the mort- "gage.

"The other points made on the re-argument fall within the "principles announced in the former opinion. They relate to "the right of preemption ligitated before another tribunal."

We also take the liberty of printing here our argument, (which is not lengthy,) on the re-hearing, believing that it expresses our views of the case as fullly as we can express them here:

"From the announcement made by the Court on granting the motion for a re-hearing in this case, we will only argue the questions as to whether the mortgage which the complainant seeks to foreclose in this case is void. And whether if it is, it is only so as against the United States, and whether appellees are in a condition to take advantage of it, if it is void. The reasons why we did not argue this on the original hearing, are: First. That it was not suggested in the Court below, and we either did not see brother Moore's argument in time to answer it, or if we did we did not consider *this point* of sufficient importance to reply to it. The last clause of the twelfth section of the act of September 4th, 1841, is as follows: 'And all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.' We understand our brother Moore contends under this, that the mortgage we are seeking to foreclose is void, because it was made before a patent to the land was issued, and being void, he can attack it.

"To which we reply? The title of a preemptor to the land after proof of settlement and entry, and a payment of the money, is a perfect title in every respect, except in the action of ejectment it cannot prevail over a patent that may be issued to another, but in equity it is perfect for all purposes, and even before entry and purchase it is held in this State by this Court, by repeated decisions, that it is subject to sale, and can be disposed of; especially is this so unless the sale is expressly prohibited by law.

May vs. Sims, 20 *Ill.*, 95.
Delauney vs. Burnett, 4 *Gilm.*, 454.
Phelps vs. Smith, 15 *Ill.*, 572.
Morehouse vs. Phelps, 18 *Ill.*, 472.

"After entry and payment it has passed from the control of the government; it has nothing to do but to issue the patent, as complete evidence of the right. The patent does not give any title to the land; it is only evidence of the right. No reservation or appropriation of a tract of land can be made after a citizen has acquired a right to it under a preemption law.

United States vs. Fitzgerald, 15 *Peters*, 407.

"The claim of a preemptor is not that shadowy right, which by some it is considered to be, but when covered by the law is a legal right, and this language is used in a case where the entry was not consummated.

Lytle vs. State of Arkansas, 9 *Howard*, 314.

"In this State the certificate of entry is a title upon which ejectment may be sustained; this is too familiar to the Court to need or warrant the citation of authority. Bunn, then, after his entry and payment of the money, had a title good for all purposes, unless he is restrained by positive law from selling until after the issuance of the patent. The policy of the law in this country is not to restrain the alienation of real estate. And this Court will not presume that Congress would contravene this well settled policy in the absence of express law, that cannot be construed otherwise.

"We come now to consider the act of 1841. The whole act is to be taken together, to get the meaning of the legislative body. The next section after the one quoted by brother Moore, the 13th, provides, that before a party shall be permitted to enter the land he shall make a written affidavit, and among other things that he or she has not directly or indirectly made an agreement or contract in any way or manner, with any person or persons, whatever, by which the title that he or she might acquire from the government of the United States should enure in whole or in part, to any person except himself or herself. And it any person taking such oath shall swear falsely in the premises, he or she shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he or she shall have paid on said land, and all right and title to the same. And any grant or conveyance which he or she may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, will be null and void. It is evident from this that a conveyance in the hands of a *bona fide purchaser* for a valuable consideration is not null and void.

And this Court in May vs. Sims, 20th Ill., on page 100, in construing this, well put the question: and if he was such a purchaser, did not the act of 1841 protect his rights?

"There is no pretence in this case that Lewis Bunn, the original mortgagee from Thomas J. Bunn, the preemptor, is not a *bona fide* purchaser, and especially is there no pretence that Robbins, the complainant in this case, is not a *bona fide* purchaser of the mortgage, and this is the end of the objection that this mortgage is void, and we might here safely leave the argument. But we will briefly inquire what is the meaning of the latter clause of the twelfth section of the act of 1841? All assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be *null* and *void*;—the meaning of this is evident, that before the proof is made, required by the statute of the settlement, &c., before the party has acquired any estate in the land, but while he has his inchoate right secured by the statute to make this proof, and enter and pay for such land, this right is not to be assigned nor transferred. Does it mean after he has perfected his right by making his proof and entering and paying for the land, and thus acquired the full ownership of it, that he cannot *sell* or *convey* the land itself. If the intention of Congress was to prevent the alienation of the land at any time before the issuance of the patent, they have chosen very inapt and untechnical words to convey such intent. Assignment and transfer of a right is not the language that would be used if the intent had been to prevent a sale or conveyance of the land.

"The meaning is evident, that while the right existed in the inchoate form, it should not be assigned or transferred to another. And the reason of this is plain, that by permitting such transfers it would complicate the taking of proofs, and would hold out inducements to perjury, and it was to prevent this, that this clause was put into this statute. But what interest the government could have in the fact, whether the land should be sold after it was entered and paid for, before the issuance of the patent, we cannot perceive. But as purchasers for valuable consideration in good faith, are such favorites of the law, Congress especially provided in the next section, that they should be protected even if the right was assigned or transferred before the entry. We do not suppose it will be argued, that we are not purchasers in good faith for a valuable consideration. We show the note and mortgage with the assignment to the complainant, and there is

no pretence in the record anywhere that he did not purchase and pay for the same in good faith, and that being the case, the Court is bound to protect him, no matter what construction may be given to the twelfth section. But under a fair construction of the entire act, could any one but the government take advantage of a violation of the law? There is nothing in the whole act that contemplates that any one except the government can take advantage of it. And as it is, (at least under the construction claimed by our brother Moore,) a highly penal statute, we invoke the familiar principle that the *law* abhors a forfeiture, and will never enforce it, except in a very clear case, and that a Court of Equity never will. We would suggest that it comes with bad grace from our brother Moore, to say this mortgage is void because we have no patent, when, but for him, we would have one. The only reason we do not have a patent for the whole land is because by his own wrong he has got a patent for a part of it, and refuses to surrender it on the request of the department, in order that a patent might be issued to us. We conclude, then, that the act of 1841 did not intend to prevent the alienation of the land after it is entered and paid for; that this being against the policy of our system of government is not to be presumed and must plainly appear; that the language used in the twelfth section is not apt language to express such an intent, but is apt language to forbid the assignment or transfer of the right to make proof and payment before it is done. But in any or all events, innocent purchasers for value must be protected, and the title held by them is good. We are such an innocent purchaser of value, and the Court will protect us. May vs. Sims, 20th Ill., 100 *supra*.

"We submit, then, with entire confidence, if the point made on the re-hearing had been made on the original hearing, that your Honors would have arrived at the same conclusion that you did, and that the opinion delivered is sound law, and should stand as the opinion of the Court.

"On this opinion and argument we submit the case. The acts referred to in the opinion of Chief Justice Lawrence, will be found as follows:

The act of 1830, *U. S. Statutes at Large*, IV, 421.
The act of 1832, *U. S. Statutes at Large*, IV, 496.

"To sum up briefly: This Court will not review the decision of the officers of the land office on a question of fact, heard on full evidence, where there is no allegation or pretence in the pleadings that there was any fraud in the officers making the decision, nor any accident nor mistake, nor any false evidence before them. But all that is or can be alleged against the decision is that it is an erroneous decision or error of honest judgment on the facts, and this we deny, as we say, the Court, on examination of the facts will arrive at the same conclusion on these facts, that the register and receiver, and two different Secretaries of the Interior have arrived at. And we invoke the general policy of liberal interpretation of the laws, in favor of this class of claimants of the public domain as instanced in Clement vs. Warner, 24 How., *supra*.

ROBERT E. WILLIAMS,
Of Counsel for Defendant in Error.